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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Section 404 of the Clean Water Act and its regulations allow the Army Corps of Engineers to issue permits for dredge and fill activities in wetlands where no practicable alternative site "is available." In this case, the Corps issued a permit, finding that no alternative site was available at the time of permit review. EPA vetoed the permit on the ground that an alternative was available to the applicant when it "entered the market."

The question for this Court is whether the Second Circuit erred in upholding EPA's "market entry" theory of practicable alternatives where the theory provides no standard to guide the regulated community, is inconsistent with the purpose of the Act and the language of the regulations, overrides determinations of state and local officials, and contradicts the settled practice of the Corps of Engineers?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioners, John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies, and the Respondents, United States Environmental Protection Agency, United States Army Corps of Engineers, Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency, Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency.

Joseph Robichaud and Citizens in Support of Attleboro Mall intervened on behalf of Petitioners in the court below. Sierra Club, Environmental Defense Fund, National Wildlife Federation, National Audubon Society, Conservation Law Foundation of New England, Inc., Massachusetts Audubon Society, Citizens for Responsible Environmental Management, Massachusetts Society for Conservation Professionals, Audubon Society of Rhode Island, Rhode Island Association of Conservation Commissioners and Natural Resources Defense Council intervened on behalf of Respondents in the courts below.

The caption of the Second Circuit's opinion is incorrect because it lists Intervenors Robichard and Citizens in Support of Attleboro Mall and the Homebuilding Association of Massachusetts as parties adverse to Petitioners, when, in fact, these parties intervened on behalf of Petitioners. The Homebuilding Association of Massachusetts did not appeal the dis-

trict court's decision. Petitioners have correctly captioned the case, *John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies v. United States Environmental Protection Agency, et al.*, for this Petition for Certiorari.

Pursuant to Rule 28.1 of the Supreme Court Rules, Petitioners Newport Galleria Group and the Pyramid Companies submit the following information:

> Petitioner Newport Galleria Group is a general partnership, none of whose partners is a corporation. Pyramid Companies is an association of related partnerships, none of whose partners is a corporation.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 8, 1988, rehearing and suggestion for rehearing *en banc* denied, September 2, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, with the dissenting opinion of Judge Pratt, (App. A), is reported at 850 F.2d 36 (2d Cir. 1988).

The Order of the United States Court of Appeals for the Second Circuit, denying Petitioners' Petition for a Rehearing and Suggestion for Rehearing *En Banc*, (App. D), dated September 2, 1988, is not reported. The opinion of the United States District Court for the Northern District of New York, (App. B), is reported at 674 F. Supp. 405 (N.D.N.Y. 1987). The Final Determination of the Assistant Administrator for External Affairs, United States Environmental Protection Agency, Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(c) of the Clean Water Act ("Final Determination"), (App. C), dated May 13, 1986, is not reported.

JURISDICTION

The Petitioners brought suit in the United States District Court for the Northern District of New York, invoking federal jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The Second Circuit denied Petitioners' petition for rehearing on September 2, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provision, Section 404 of the Clean Water Act ("the Act"), 33 U.S.C. § 1344, is reproduced in the Appendix (App. E), as is the key regulatory provision, 40 C.F.R. § 230.10(a), (App. F).

STATEMENT OF THE CASE

A. Introduction

This case presents an issue that is critical to the administration of a permit program jointly administered by the United States Army Corps of Engineers (the "Corps") and the United States Environmental Protection Agency ("EPA" or the "Agency"), under Section 404 of the Clean

Water Act ("CWA" or "the Act"). Section 404(a) of the Act authorizes the Corps to issue permits for the discharge of dredged or fill material into the Nation's waters if the proposed project satisfies regulations promulgated by EPA and the Corps pursuant to Section 404(b). Under the Section 404(b) regulations, no permit will be issued if a practicable alternative site "is available" to the applicant. Section 404(c) authorizes EPA to veto a Corps-issued permit to protect certain environmental interests.

In this case, the Corps found that no alternatives were available to the Petitioner at the time of permit review and decided to issue a permit. EPA determined, however, in a departure from settled administrative practice, that availability of alternatives should be judged as of the time the applicant "entered the market" and, applying that theory, vetoed the applicant's project.

As Judge Pratt observed in dissent below, the market entry theory "approaches a sensitive environmental problem through a time warp, it ignores the statute's basic purpose, and it creates unfair and anomalous results." 850 F.2d at 48; App. A 25a.

In addition, the theory establishes a standardless inquiry that virtually invites arbitrary and unequal application. It makes no sense in the real world of land use planning, financing and development, and it severely erodes the ability of public facilities planners, state and local land use planners and private investors to make reasoned judgments in carrying out their responsibilities.

Moreover, the theory contradicts the practice and understanding of the Corps, which, as the permitting authority under the Act, is the agency most intimately involved in administering the relevant regulations. It is also contrary to the language of the regulations and to EPA's own previous interpretation of those regulations. If left uncorrected, the Second Circuit's adoption of EPA's "market entry" theory as the only correct understanding

of the regulations will throw what had previously been settled administrative practice of permit review into a state of irremediable confusion.

B. The Statutory And Regulatory Framework

The Clean Water Act prohibits the discharge of any pollutant, including dredged or fill materials, into the Nation's waters, including wetlands, except in compliance with the Act. CWA § 301(a), 33 U.S.C. § 1311(a). Section 404 is an exception to the Act's general prohibitions. It establishes a permit program under which the Corps may authorize discharges of dredged and fill materials in certain circumstances. CWA § 404, 33 U.S.C. § 1344. The program regulates a vast array of activities, ranging from the construction of a tennis court in a homeowner's backyard to construction of new residential subdivisions, office parks, and shopping malls to large public construction projects involving, for example, highways, port improvements, public marinas, parks, public housing, schools and colleges. The Corps administers the program and reviews approximately 14,000 individual permit applications every year.[1] Thousands of other projects are regulated by general permits issued in accordance with Section 404(e). 33 U.S.C. § 1344(e); 33 C.F.R. Part 330.

Although EPA has authority to issue permits under other sections of the Act, Congress made the Corps the permitting authority under Section 404, in recognition of the Corps' special expertise in this area. 33 U.S.C. § 1344(a); App. E 111a. Section 404(b) provides that the Corps must base its permit decision on guidelines (the

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[1] United States General Accounting Office, *WETLANDS, The Corps Of Engineers' Administration Of The Section 404 Program, Report to the Chairman, Subcomm. on Investigations and Oversight, Comm. on Public Works and Transportation, House of Representatives* 11 (Washington, D.C.: GAO/RCED-88-110, July, 1988) (In 1986, the Corps issued approximately 10,500 permits and denied an estimated 500 applications; 3,000 applications for permits were cancelled or withdrawn).

"404(b)(1) guidelines") developed by EPA in conjunction with the Corps. 33 U.S.C. § 1344(b); App. E 111a. These guidelines require the Corps to consider a comprehensive range of environmental, scientific, and economic factors in making its permitting decisions. 40 C.F.R. Part 230. In addition, the Corps applies a wide-ranging "public interest review" under regulations that were already in effect at the time the Clean Water Act was passed.[2]

Of particular importance here, the Corps may not issue a permit if there is a "practicable alternative" available to the applicant that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a); App. F 113a-114a. An alternative is "practicable" if it is available to, or can reasonably be obtained by, the applicant and will fulfill the applicant's project purpose. 40 C.F.R. § 230.10(a)(2); App. F 113a. With respect to "non-water-dependent activities" proposed for wetlands (*i.e.*, activities that could be accomplished on non-wetland sites, such as construction of a shopping mall), practicable alternatives are "presumed to be available" unless the applicant clearly demonstrates otherwise. 40 C.F.R. § 230.10(a)(3); App. F 113a-114a.

Finally, Section 404(c) of the Act authorizes EPA to overrule a Corps decision to grant a permit and so to prohibit the use of a specific area as a discharge site for dredged or fill material whenever EPA "determines . . . that the [proposed] discharge . . . will have an unacceptable adverse effect" on one of five specifically enumerated environmental interests. 33 U.S.C. § 1344(c); App. E 111a-

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[2] In this review, the Corps balances the "national concern for both protection and utilization of important resources," considering a wide range of factors such as "conservation, economics, aesthetics, general environmental concerns, wetlands . . . and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4.

112a. In exercising this authority, EPA has the burden of proving that an "unacceptable adverse effect" will occur.[3]

In this case, Pyramid sought to fill a wetland and in an approximately 18-month period obtained all the necessary permits from the local government and the State of Massachusetts, including approval under the Massachusetts Wetlands Protection Act, and from the Corps pursuant to Section 404(a) and (b). In approving the project, the Corps specifically found that no practicable alternatives were available to Pyramid. EPA, however, overrode the Corps' decision, vetoing the permit on the ground that a site optioned by a competing shopping center developer three months before Pyramid began searching for sites in the Attleboro, Massachusetts area "is available" to Pyramid within the meaning of the guidelines.

C. Pyramid's Project And The Site

Pyramid is a large shopping center developer in the Northeast. It began searching actively for suitable sites in the Attleboro, Massachusetts area in September 1983. JA 225, JA 291.[4] Pyramid purchased an 82-acre site ("South Attleboro") from the Edward J. DeBartolo Corporation ("DeBartolo"), another shopping center developer, in December 1983, and proposed to build a two-level shopping mall. App. C 95a. The site contains 49.6 acres of red maple swamp.

Pyramid has a competitor in the vicinity, New England Development Company ("NED"). On July 1, 1983, before Pyramid began looking for sites in the area, NED had

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[3] 45 Fed. Reg. 85,336, 85,338 (December 24, 1980); 44 Fed. Reg. 58,076, 58,080 (October 9, 1979).

[4] References to the Joint Appendix filed in the court below are as follows: "JA ___." References to documents in the Administrative Record which are not included in the Joint Appendix are as follows: "AR, ___." References to the Appendix filed with this Petition are as follows: "App. A ___," and so forth.

acquired a two-year option on another shopping center site ("North Attleboro"). *Id.*

D. Proceedings To Date

1. State and Local Permit Proceedings and Approval of Massachusetts Supreme Judicial Court

After acquiring its site in December 1983, Pyramid applied for and obtained all necessary state and local approvals.[5] Among other things, Pyramid obtained a state wetlands permit for the project pursuant to the Massachusetts Wetlands Protection Act, and the Massachusetts Supreme Judicial Court upheld the permit. *Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 511 N.E.2d 562 (1987).

2. Corps Regulatory Proceedings

Pyramid applied to the New England regional office of the Corps ("NE Corps") for an individual permit in July 1984. The application stated that North Attleboro was "unavailable." AR, B-2 11. Because the NE Corps was unable to resolve certain policy issues not relevant to this Petition, the Corps' Director of Civil Works ordered the case to be elevated to Corps headquarters.

The Director of Civil Works determined that the project satisfied the 404(b)(1) guidelines and the Corps' public interest review regulations, and directed the local office to issue a permit. On the key issue of availability of alternatives, the Director agreed with the NE Corps and found

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[5] The land was rezoned for development as a shopping center, and the Massachusetts Department of Public Works approved all necessary roadway modifications. State water quality certification was issued in March 1985, pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341. In accordance with the Massachusetts Environmental Policy Act, an Environmental Impact Report was prepared and approved by the Commonwealth's Office of Environmental Affairs. AR, B-4. The Mayor, City Council, City Planner, and the City's economic development agency all support the project. JA 89.

that North Attleboro was not available "because it has been optioned by another mall developer." JA 83. On June 28, 1985, the NE Corps formally notified the regional offices of EPA and the United States Fish and Wildlife Service that it intended to issue a permit to Pyramid. AR, B-16.

3. EPA Regulatory Proceedings

In July 1985, EPA's Regional Administrator notified the Corps and Pyramid that he intended to initiate veto proceedings under Section 404(c). AR, B-18. On March 4, 1986, the Regional Administrator recommended to EPA headquarters that Pyramid's project be prohibited, urging a legal rationale that headquarters would later reject. JA 119-196. EPA's Assistant Administrator for External Affairs ("Assistant Administrator") issued a Final Determination on May 13, 1986, prohibiting the project because it would have avoidable, and, therefore, "unacceptable," adverse effects on wildlife. App. C 108a.

In reaching this conclusion, the Assistant Administrator first found that of the environmental interests protected by Section 404(c), only wildlife would be adversely affected. *Id.* at 82a. She then examined whether the adverse effect was unacceptable "by reviewing whether there are practicable, less environmentally damaging alternatives" to the South Attleboro site. *Id.* at 83a.

Turning to "practicable alternatives," the Assistant Administrator rejected the longstanding Corps understanding that the availability of alternatives is considered at the time of permit review. Instead, she changed the rules of the game and determined that availability should be tested as of the time the applicant "entered the market." *Id.* at 95a. She did not, however, define what constitutes "market entry." This theory had never been advanced or suggested, either by the Corps or EPA, before this proceeding.

Pyramid had begun its investigation of the trade area in September 1983, approximately eight weeks after its

competitor NED had optioned the North Attleboro site. The Assistant Administrator, however, applying the retroactive market entry theory, relied on alleged "trade custom" to find that Pyramid must have "entered the market" before the date on which NED had optioned North Attleboro. *Id.* at 95a n.15. Then, ignoring the fact that EPA's own regulations place the burden in a 404(c) proceeding on the Agency, the Assistant Administrator concluded that "[o]n this record, I cannot find that Pyramid has met its burden of showing that the North Attleborough [sic] site was unavailable." *Id.* at 95a-96a. Since, according to this novel analysis, the North Attleboro site was "available" to Pyramid when it entered the market, the Assistant Administrator concluded that any adverse effects resulting from Pyramid's project were "avoidable" and therefore "unacceptable." *Id.* at 108a. She therefore vetoed the permit.

4. District Court Opinion

The district court upheld EPA's Final Determination. Although the court rejected the Agency's "trade custom" inference, it deferred to EPA's interpretation of the regulation, holding that its "carefully circumscribed" function was to "uphold a reasonable [EPA] interpretation, even if the court would not have reached the same conclusion in the first instance." 674 F. Supp. at 412; App. B 45a.

5. Second Circuit Opinion

The Second Circuit affirmed, with one judge dissenting. 850 F.2d at 43; App. A 5a. While it was uncertain whether EPA's interpretation merited deference, the court ruled that the "market entry" theory was the only reasonable interpretation of the regulations. 850 F.2d at 44; App. A 17a. Rejecting Pyramid's argument that "market entry" was little more than a standardless evasion, the court observed that there was no need to "pin down the standard," for to do so would only "confuse things further." 850 F.2d at 45; App. A 22a.

Judge Pratt dissented on the ground that the market entry theory improperly focuses on the decision-making techniques and tactics of a developer at the time it entered the market, rather than the actual alternatives to development in wetlands, which is Section 404's central purpose. 850 F.2d at 48; App. A 25a. The proper time to analyze the availability of alternatives, Judge Pratt found, is as of the time EPA makes its 404(c) decision, a position that is "reinforced by the present-tense language of the regulation, which commands EPA to determine whether an alternate site 'is available.' " 850 F.2d at 49; App. A 29a.

REASONS FOR GRANTING THE WRIT

This case raises important issues of statutory and regulatory construction in the administration of the Clean Water Act.[6] The Corps evaluates approximately 14,000 individual applications for Section 404 permits per year. The cornerstone of the Corps' Section 404 analysis is its threshold determination whether there is a practicable alternative site for the proposed project. Until the decision in this case, the Corps and EPA had always evaluated the availability of alternatives as of the time of permit review.

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[6] This Court has granted certiorari in other cases to review similar issues. *See, e.g., Commonwealth of Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S. Ct. 1219 (1988) (Certiorari granted to determine whether private parties may sue states in federal court to recover cleanup costs under the Superfund law); *Tull v. United States*, ___U.S. ___, 107 S.Ct. 1831, 1835 (1987) (Certiorari granted to determine whether a jury trial is required to determine liability and assess penalties for violation of Section 404 of the Clean Water Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (Certiorari granted to review validity of Corps' regulations defining "adjacent wetlands" as "waters of the United States" under the Clean Water Act); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (Certiorari granted to review validity of EPA's "bubble" concept under the Clean Air Act).

In this case, the Second Circuit ignored this settled administrative practice and endorsed EPA's novel "market entry" theory of practicable alternatives, which the Agency had announced for the first time in this proceeding. But EPA's "market entry" theory provides no standard against which the regulated community can measure its conduct, no guidance for future regulatory decisions, and no standard against which a reviewing court can assess administrative decisions. Indeed, EPA appears to take the position that it can review the availability of alternatives as of any time it sees fit in each particular case. The Second Circuit has compounded the harm caused by EPA's erroneous ruling by holding that the "market entry" theory is the only correct interpretation of the regulation. What may have been only an unfair, *ad hoc* ruling against Pyramid by EPA has thus been converted into precedent binding on EPA and, apparently, the Corps in the Second Circuit. But the Corps disagrees with the "market entry" theory. Unless the decision is reversed, the result will be to throw the administration of the Section 404 program into a state of unparalleled confusion and uncertainty.

Moreover, the market entry standard imposes an oppressive and unworkable burden on private and public permit applicants. Since the applicant has the burden of demonstrating the absence of alternatives during the permitting stage (as opposed to the 404(c) veto stage) and since the court below declined to define what acts constitute market entry, no applicant will ever be able to satisfy the market entry "standard."

Indeed, private investors are constantly searching for attractive investment opportunities; they are never not in the market. The impact on public capital facilities planning can also be devastating. Consider, for example, a state highway authority that assembles parcels of land over a period of years to build a new road. Does the state highway authority enter the market when it first identifies the

need for a new road, or when it first selects a route, or when it purchases the first parcel?

Finally, the market entry theory is contrary to the plain language of the regulations and inconsistent with the intent of the Clean Water Act to protect the Nation's water resources, including wetlands. To accomplish this purpose, Congress mandated an inquiry into the wetland resource. Until the decision in this case, the Corps and EPA had always properly interpreted the statute as requiring a practicable alternatives analysis which focused on the wetland resource: before the Corps could issue a permit, it had to determine that there was no other available site whose development would cause less environmental damage. The "market entry" theory shifts the focus away from the land, making the protection afforded the wetland dependent on the owner's business practices and the date the owner is deemed to have entered the market. This inquiry loses sight of the real purpose of the Clean Water Act.

In addition, the market entry theory subtly undercuts Congress' purpose in creating the Section 404 permitting program within the Clean Water Act. That permitting program reflects Congress' recognition that environmental protection must accommodate reasonable economic development. In order to balance these conflicting goals, Congress built the practicable alternatives analysis into the Section 404 permitting decision. The Second Circuit decision will destroy that balance by giving EPA discretion to shift the timing of the alternatives analysis with each new case, and will encourage *ad hoc* decision making. EPA will always have grounds to veto a permit if it so chooses.

Unless reversed by this Court, the Second Circuit's opinion will allow federal officials absolute discretion to deny permits based on case-by-case determinations of the point of "market entry," regardless of other priorities contemplated by Congress or by local and state planning and environmental authorities. Congress did not contemplate

giving EPA this kind of authority when it enacted Section 404.

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY PROVIDES NO STANDARDS AGAINST WHICH THE REGULATED COMMUNITY CAN MEASURE ITS CONDUCT

A. The Point Of Market Entry Remains Wholly Undefined

The "market entry" theory endorsed by the Second Circuit is virtually meaningless, providing no guidance to the regulated community of the standard to which it will be held.

The Second Circuit acknowledges that the Section 404(b)(1) regulations are written in the present tense, on their face mandating an inquiry into whether an alternative "is available" to the applicant at the time the permit is reviewed. 850 F.2d at 43; App. A 16a. Yet the court ignores the regulatory language and Congressional intent and asserts that EPA's retrospective inquiry into possible alternatives at the time of "market entry" is the only possible interpretation of the regulatory term "is available." 850 F.2d at 44; App. A 17a. Moreover, the court compounds its error by ruling that it "is unnecessary to pin down the [market entry] standard . . . and that it would confuse things further to attempt to do so." 850 F.2d at 46; App. A 22a. But confusion is precisely what this opinion has sown.

EPA has consistently refused to define "market entry." In the Final Determination, EPA's Assistant Administrator referred to "market entry" alternatively as the "period when the developer is selecting a site for its project," App. C 93a, "follow[ing] the market area," *id.* at 95a n.15, "exploring the . . . trade area," *id.* at 95a, or "search[ing] for alternative sites." *Id.* at 94a.[7] In its district court briefs,

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[7] The Agency seemed to recognize that it was on difficult ground,

the government "defined" market entry as "the time of project planning," Defendants' District Court Brief at 24, "the time Pyramid began investigating the market," *id.* at 59, "search[ed] for a site," *id.*, "select[ed] the site," *id.* at 60, or "made its business decisions," *id.* at 66.

On appeal, EPA once again refused to specify the point in time at which the availability inquiry begins. Instead, it claimed the need to "reserve judgment" on this decisive question, Brief of Appellees at 32 n.20, stating opaquely that the market entry theory ". . . tak[es] account of the temporal continuum in which a wetland site-selection plan evolves." *Id.* at 28. As to which of numerous possible events would "trigger the application of the 'is available' test," EPA commented blithely:

> The plain answer is that while no one of these points may be definitive, *each* may be germaine [sic], individually and collectively.

Id. at 34 n.21 (emphasis in original).

EPA's equivocation is intolerable in light of the central role the alternatives analysis plays in the regulatory framework. An applicant simply cannot rebut the presumption that an alternative is available if EPA is allowed to shift the target date with each case.

The Second Circuit's opinion suffers from the same flaw. Though the court held that the "market entry" theory is the only correct interpretation of the regulations, it too declined to define the term either in the abstract or as

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for, after announcing the new theory, the Assistant Administrator stated, "I need not, and do not, decide here what the relevant time period would be in other circumstances. . . ." App. C 93a n.14. Were this true, the issue might not warrant this Court's review. However, given the Second Circuit's declaration that "market entry" is the only possible standard, and the Corps' contrary practice, review is critical to clarify this murky area of regulatory practice.

applied to this litigant in this case.[8] The point of market entry is left wholly undefined, with the result that the Second Circuit's opinion fails to provide guidance for future conduct by permit applicants and future decisions by the Corps and EPA.

The potential for chaos in the administration of the Section 404 program is compounded because the Corps does not agree with EPA's "market entry" concept. Thus, applicants for permits will not know what presumption it is they will be required to rebut. And if it is the "market entry" presumption, they will not know how to rebut it because the term is undefined and undefinable.

B. The Market Entry Theory Is Unworkable As A Practical Matter

Moreover, as a practical matter, governmental public facilities agencies planning to build schools, hospitals, and airports; land use planners attempting to establish a compatible mix of land uses within their jurisdictions; and private sector parties such as land developers, home builders and industrial companies are constantly evaluating the market for land use and development opportunities. They are always in the market, and therefore, in the context of their operations, "market entry" is a meaningless concept. As Judge Pratt, in dissent, observed: "Without an-

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[8] The uncertainty resulting from the Second Circuit's ruling stems in part from its refusal to undertake the kind of judicial review required in challenges to administrative action. As the District of Columbia Circuit has observed:

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.

Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); *see also Atchison, Topeka & Santa Fe Railway v. Board of Trade*, 412 U.S. 800, 806-07 (1973).

swers to these questions [about the meaning of market entry] a developer can never know whether to proceed through the expense of contracts, zoning proceedings, and EPA applications." 850 F.2d at 49; App. A 27a.

The uncertainty is compounded by the difficulty in identifying wetlands and the possibility that a landowner may be unaware that his property is a wetland. EPA's own regulations note that one needs a "specialist" to determine wetland boundaries, 40 C.F.R. 230.41(a)(2). The recent report of the National Wetlands Policy Forum (convened by the Conservation Foundation at the request of EPA) confirms the problem:

> Determining whether a particular piece of property is a wetland can sometimes be difficult. To an untrained person, for instance, some forested wetlands may appear very similar to nearby upland forests. An expert in vegetation, soil, and water conditions may be needed to tell the difference. For this reason, a landowner may not even realize that a piece of land qualifies as a wetland and is therefore subject to regulation.[9]

Notwithstanding these difficulties, the "market entry" theory requires an applicant to survey the market long before it may be aware that its site is even a wetland covered by the Act. If it proceeds with construction unaware that the site is a wetland, it will be impossible for an applicant, for example, a commercial home builder, to show that it had considered alternatives when it entered the market years earlier. *See* Amici Petition for Certiorari of National Association of Home Builders *et al.*

Other practical difficulties with the "market entry" theory depend on the nature of the permit applicant, its proj-

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[9] The Conservation Foundation, *Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum* 36 (1988).

ect and its site. Many such problems are elaborated by *amici* urging this Court to review the Second Circuit decision. For present purposes, a few examples will suffice.

Local, state and regional planning efforts will be undermined. Under the market entry theory, EPA could, for example, claim the authority to deny a municipality's application for a permit to construct a resource recovery facility on the ground that the town council did not consider all alternative sites at its first public hearing concerning the facility years earlier. *See* Amicus Petition for Certiorari of American Planning Association.

The theory will be equally damaging to the nation's port authorities, many of which have owned substantial parcels of wetlands adjacent to waterways for decades. If, for example, a port authority applies for a permit to expand commercial activity in a wetland, then, presumably, under the Second Circuit holding, the Corps would be required to consider alternatives available when the port "entered the market." It remains an open question whether market entry occurred when the state passed legislation creating the port authority forty years earlier, or when the port purchased the property in question some twenty years earlier, or when the port's consultants first identified the need for additional commercial development five years ago. The uncertainty surrounding the timing of the alternatives analysis will undoubtedly delay or impair the port's ability to upgrade deteriorating facilities as financial markets may either refuse to finance such projects or exact high premiums to compensate for the increased risks. Other public facilities agencies will face similar problems, and the requirement that they actually make inquiries about availability, thus virtually advertising their intentions to buy property for roads, schools and the like, will undoubtedly add to the cost of acquiring needed land.[10]

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[10] Had EPA submitted its "market entry" theory to formal rulemak-

Only this Court can rectify the chaotic situation created by the Second Circuit opinion by requiring the agencies to articulate a standard with sufficient clarity to apprise the regulated community of the standard to which it will be held.[11]

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY IS CONTRARY TO THE STATUTORY AND REGULATORY SCHEME

A. The Market Entry Theory Is Inconsistent With The Purpose of Section 404

The Second Circuit has held that the market entry theory is the only correct interpretation of the regulations. The court's only justification for the decision is its assertion that the market entry theory is consistent with the objectives of the Clean Water Act, and that the Corps' and EPA's prior understanding of the regulation would "thwart" these objectives.[12] 850 F.2d 43-44; App. A 16a-

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ing procedures, as its regulations require, it would have become aware of these practical difficulties. The "market entry" theory is a modification to the "basic application" of the Section 404(b)(1) guidelines. Under the guidelines themselves, such modifications may only be accomplished by notice and comment rulemaking and in conjunction with the Corps. 40 C.F.R. § 230.2(c). In addition, the Administrative Procedure Act, 5 U.S.C. § 552, requires that agency "policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The "market entry" theory is such a policy.

[11] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) (EPA regulation requiring denial of permit for construction of parking spaces unless they "will not interfere" with attaining air quality standards was held impermissibly vague: "The prospective applicant for a permit is utterly without guidance as to what he must prove, and how. And the standard is so vague that it invites arbitrary and unequal application").

[12] The only evidence the court offers in support of its claim that EPA's retrospective analysis is consistent with Congressional intent is

17a. The court is wrong.

Congress passed the Clean Water Act in 1972 to protect the Nation's water resources, including wetlands. 33 U.S.C. § 1251. Recognizing the need to accommodate reasonable economic development and other values in the public interest, Congress did not ban the "discharge" of all "pollutants" but set up permitting programs to regulate such discharges. Section 404 established the permitting program that regulates the discharge of dredged and fill materials. 33 U.S.C. § 1344(a); App. E 111a. To effectuate the balancing between environmental and other goals, Congress required the regulations governing Section 404 permitting decisions to include consideration of whether the permit applicant could accomplish its purpose at an alternative site that would have less adverse environmental impacts.[13]

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one line from the preamble to EPA's regulations. According to the court:

> [T]he preamble to the 404(b)(1) guidelines states that the purpose of the 'practicable alternatives' analysis is 'to recognize the special value of wetlands and to avoid their unnecessary destruction, particularly where practicable alternatives *were* available in non-aquatic areas to achieve the basic purpose of the proposal.' 45 Fed. Reg. 85,338 (1980) (emphasis added by the court).

850 F.2d at 43-44; App. A 16a. The Agency's preamble is, of course, not evidence of Congressional intent. In addition the phrase the court quotes is out of context. Notwithstanding the court's emphasis on the past tense "were available," the sentence was written in the past tense because EPA was explaining the meaning of a regulatory test it had once proposed to adopt but since had decided to reject. Quoted in its entirety, the sentence reads: "The original purpose, which many commenters commended, was to recognize the special values of wetlands and to avoid their unnecessary destruction, particularly when practicable alternatives were available in non-aquatic areas to achieve the basic purposes of the proposal." 45 Fed. Reg. 85,338-339.

[13] 33 U.S.C. § 1344(b) (requiring that the governing regulations be based on the ocean discharge criteria contained in Section 403(c), 33

Thus, Congress commanded an objective inquiry into the impacts on the physical environment that would result from the choice of one site over another.

As Judge Pratt pointed out in dissent, the "market entry" theory strays from the statute's central purpose. It disregards the environmental impacts on the land in question and on alternative sites and instead makes the protection afforded the wetland dependent on when the owner "entered the market." Such an inquiry, however, does not protect the wetland:

> The market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved. Under the market entry theory, developer A would be denied a permit on a specific site because when he entered the market alternatives were available, but latecomer developer B, who entered the market after those alternatives had become unavailable, would be entitled to a permit for developing the same site. In such a case, the theory no longer protects the land, but instead becomes a distorted punitive device: it punishes developer A by denying him a permit, but grants developer B a permit for the same property—and the only difference between them is when they 'entered the market.'

850 F.2d at 48; App. A 26a-27a (Judge Pratt dissenting).

Not only does the market entry theory fail to protect the wetland but it leads inevitably to consideration of factors far different from those contemplated by Congress when it mandated consideration of the relative environmental impacts resulting from the use of alternative sites.

U.S.C. § 1343(c)); 33 U.S.C. § 1343(c)(1)(F) (requiring consideration of "land based alternatives").

In this case, for example, EPA demanded copies of private business memoranda, correspondence and other records concerning Pyramid's relationship with the previous owner of the South Attleboro site, Pyramid's business plans in other trade areas outside of the Attleboro trade area, cost estimates for various features of Pyramid's proposed project, and details of Pyramid's dealings with real estate agents and potential tenants for its shopping mall.[14] JA 267-271. This is not the inquiry into the impacts on the physical environment that Congress contemplated when it established the alternatives analysis.[15]

The court suggests that the "market entry" theory vindicates the Act's goals because it creates an incentive for

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[14] The result of this and other similar tangents pursued by EPA is that EPA simply lost sight of the purpose of the alternatives analysis, which is to determine whether, in fact, an alternative "is available." Instead, it recast the inquiry to determine whether the applicant had been "truly fastidious" in investigating alternatives. Brief of Appellee at 32 n.20. The bankruptcy of EPA's position is summed up by a hypothetical it posed:

> A hypothetical case in which the applicant convincingly demonstrates that when it undertook its market survey an alternative was not obtainable, and only much later became so, might at least in some circumstances possibly call for a different Section 404(c) outcome.

Id. As this hypothetical so candidly suggests, EPA's "market entry" theory simply does not protect the wetland resource. It merely punishes or rewards developers based on EPA's perception of their bona fides.

[15] *See Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 566-68 (D. Mass. 1987), *appeal denied*, 841 F.2d 440 (lst Cir. 1988), *cert. denied sub nom. New Haven v. Marsh*, ___U.S. ___, 109 S.Ct. 128 (1988). (Where Corps' denial of permit is based on economic factors, such factors must be "proximately related to changes in the physical environment . . . Corps may not . . . consider effects unrelated to the impact which a proposed project will have on the environment.") Because the date of market entry is totally unrelated to the impacts a given project will have on the environment, it is an improper basis for a permit decision under Section 404.

developers to search for alternative sites at the time they first consider development.[16] Such an incentive, however, exists regardless of the timing of the alternatives analysis. No developer would choose a wetland site and risk its costly investment on a hunch that by the time of permit review *all* uplands sites would no longer be available. Indeed, the applicant's knowledge that it will be required during permitting to establish the absence of uplands alternatives is by itself a substantial incentive to avoid a wetlands site.

Not only does the market entry theory lead the Agency far afield of the inquiry Congress contemplated but it subtly undermines the integrity of the balance Congress sought to establish through the alternatives analysis. As Judge Pratt pointed out in dissent:

> Congress designed [Section 404] to preserve the environment consistent with reasonable accommodation to the economic and social needs of the public; it was not concerned with the identities or past activities of particular developers.

850 F.2d at 48; App. A 26a.

Accordingly, Congress established a permit program under Section 404(a) which is intended to authorize discharges as long as there is compliance with certain requirements.[17] Congress contemplated that in making a permitting decision the Corps would balance environmental

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[16] Conversely, the court argues that if alternatives were not available when the developer purchased its site, but became available by the time of permit application, the application would be denied. 850 F.2d at 44; App. A 17a. Pyramid has always agreed with this statement. If a feasible alternative is available at the time of permit review, the application should be denied.

[17] *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46 (D.C. Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 68 (1988) (Section 404(a) establishes an exemption from "Section 301(a)'s broad ban on discharge of pollutants into navigable waters").

protection and economic concerns, and that the Corps could determine under Section 404(b) that economic concerns or other competing values outweighed environmental protection in a particular case.[18] EPA, on the other hand, was empowered under Section 404(c) to veto the Corps' decision to grant a permit in the event EPA determined that the proposed project "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[19]

Thus, Congress gave discrete roles to the Corps and EPA. It authorized the Corps to make the permitting decision based on numerous environmental and economic factors in its public interest review and on the balancing process inherent in the 404(b)(1) guidelines' practicable alternatives analysis. Congress gave EPA the power to veto a project based on environmental considerations. In this case, EPA did not rely on its environmental expertise. Rather, it rejected the Corps' analysis of available alternatives and economic impacts, and offered its market entry theory instead.[20] In doing so, the Agency upset the political

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[18] "[W]here it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 n.9 (1985); *Monongahela Power Co. v. Marsh*, 809 F.2d at 46 (In enacting Section 404, "Congress insisted upon stringent federal discipline in an effort to curb ecological pollution and degradation without interfering unjustifiably with farming, forestry, and other legitimate activities reserved for regulation primarily by local governments").

[19] 33 U.S.C. § 1344(c), App. E 111a-112a; S. Conf. Rep. 1236, 92d Cong., 2d Sess., at 141 *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3818-19.

[20] In addition, as discussed more fully in the Petition for Certiorari filed by the Citizens In Support of Attleboro Mall, EPA's consideration of cumulative impacts in the context of a Section 404(c) action was

compromise struck by Congress.[21] The Second Circuit opinion, by endorsing the market entry theory and giving EPA unlimited authority to shift the time of market entry on an *ad hoc* basis, effectively vitiates the Congressional compromise.[22]

Moreover, as Judge Pratt pointed out, the market entry theory may also be easily circumvented:

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wholly improper. Section 404(c) authorizes the Administrator to prohibit or restrict the use of a "defined area" when the Administrator "determines . . . that the discharge of . . . materials into such area will have an unacceptable adverse effect." 33 U.S.C. § 1344(c); App. E 111a-112a. Clearly, the statute contemplates a site-specific inquiry. Thus, the issue in a 404(c) case should be whether the environmental impacts on the "defined area" are so great as to cause an unacceptable adverse effect. EPA, however, ignored the Congressional intent and improperly based its decision on the "cumulative loss" in Massachusetts. App. C 107a.

[21] After considering several different administrative arrangements for handling the discharge of dredged and fill materials, each of which proposed a different allocation of permitting authority between the Corps and EPA, Congress ultimately decided to give the permitting authority to the Corps. In so doing, it expressly carved the Section 404 program out of EPA's permitting authority under other sections of the Act. It made this choice in recognition of the Corps' special expertise on dredge and fill matters and long experience in managing related permitting programs under Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 402, and to avoid "creat[ing] a burdensome bureaucracy." S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972 ("1972 Leg. Hist.") at 1685-92; Senate Debate on S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 Leg. Hist. at 1386, 1392; H.R. 11896, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 Leg. Hist. at 1063-64; Senate Consideration of the Conference Report (Oct. 4, 1972), *reprinted in* 1972 Leg. Hist. at 177.

[22] *See Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1309 (7th Cir. 1983) ("[W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. . . The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck").

> In this case, for example, if a Donald Trump had "entered the market" after NED took the option on the North Attleboro site and made it unavailable, under EPA's approach he apparently would have been entitled to a permit to develop Sweedens Swamp. But after obtaining the permit and the land, could Trump then sell the package to Pyramid to develop? Or could he build the mall and then sell the developed site to Pyramid? If, on the one hand, the answer to these questions is "yes", then the market entry theory is no more than a troublesome mirage that could easily be circumvented by Pyramid's using a second party to buy the land and obtain the permit. If, on the other hand, the answer is "no", then Pyramid is forever tainted, forever prohibited—somewhat like a bill of attainder—from owning this particular site, and only because at some time in the past it had "entered the market" while an alternative was still available.

850 F.2d at 48-49; App. A 27a.

In sum, the market entry theory is inconsistent with the purpose of Section 404 itself. The result is a standard that is unworkable in the real world and that will not protect wetlands.

B. The Market Entry Theory Is Contrary To The Language Of The Section 404(b)(1) Guidelines

The market entry theory is also inconsistent with the language of the Section 404(b)(1) guidelines. As noted earlier, the guidelines require the Corps to determine whether "there *is* a practicable alternative to the proposed discharge." 40 C.F.R. § 230.10(a) (emphasis added); App. F 113a. The term "practicable alternative" is also defined in the present tense:

> An alternative is practicable if it *is* available. . . . If it is otherwise a practicable alternative, an area not *presently* owned by the applicant which *could* reasonably *be* obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity *may be* considered.

40 C.F.R. § 230.10(a)(2) (emphasis added); App. F 113a. An alternative "is available," then, only if it is available to, or could reasonably be obtained by, the applicant at the time the Corps makes its decision on the permit application. By finding that it should consider availability retroactively to the time the applicant "entered the market," EPA distorted the language of the regulation.

Stated simply, EPA says "is" means "was."

This Court recently rejected a similar effort to convert present-tense language to the past tense, enjoining courts and presumably agencies to give statutes their "most natural reading." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, ___U.S. ___, 108 S.Ct. 376, 381 (1987).[23]

Furthermore, although no cases have directly addressed the timing of the practicable alternatives test, in every reported case the Corps has analyzed availability of alternative sites at the time of permit review, and the courts have affirmed decisions based on that analysis.[24] Indeed,

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[23] The Second Circuit's reading of the guidelines is both unnatural and strained: "[T]he 'present' of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times." 850 F.2d at 43; App. A 16a. The two specific times mentioned by the Court are consistent with Petitioner's position. As to what "any number of other times" might be, that is precisely what we have been asking for over two years.

[24] *See National Audubon Society v. Hartz Mountain Development Corp.*, 14 Envtl. L. Rep. 20724, 20731 (Envtl. L. Inst.) (D.N.J. Oct. 24, 1983) (Corps, with court approval, examined over a dozen alternatives available to applicant at time of permit review. Neither the Corps nor the court speculated as to what alternatives might have been available to

not only has the Corps applied a present-tense analysis, but EPA itself has consistently done so in prior 404(c) proceedings.[25]

C. The Second Circuit Decision Distorts The Regulatory Scheme By Allowing EPA To Ignore Its Burden Of Proof Under Section 404(c)

The Second Circuit opinion, by allowing EPA to ignore its burden of proof under Section 404(c), distorts the regulatory scheme. When EPA invokes its 404(c) authority, overriding a contrary Corps decision, the regulations place on the Agency the burden of proving that an applicant's project will have an "unacceptable adverse effect" on the proposed site.[26]

EPA simply ignored its burden, claiming that a veto was warranted because it was not satisfied that Pyramid had demonstrated, at the permitting stage under Section

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able to applicant at time of permit review. Neither the Corps nor the court speculated as to what alternatives might have been available to the applicant at some indeterminate point when the company "entered the market"); *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (Court affirmed Corps' evaluation of alternatives available at time of permit review despite the fact that filling had already occurred and applicant was applying for an after-the-fact permit); *cf. Hough v. Marsh*, 557 F. Supp. 74, 83-84 (D. Mass. 1982) (Court invalidates 404 permit where it was doubtful that information used in alternatives analysis accurately depicted market conditions at time of permit decision).

[25] Excluding the decision under review here, EPA had issued only four 404(c) Final Determinations prior to its veto in this case. In two of these cases, the question of practicable alternatives was not an issue. In the two others, EPA examined only alternatives that were available to the applicant at the time of the 404(c) proceeding. "Final Determination of the Assistant Administrator for External Affairs Concerning the Jack Maybank Site on Jehossee Island, South Carolina Pursuant to Section 404(c) of the Clean Water Act," April 5, 1985 ("*Maybank Determination*"); "Final Determination of the Administrator Concerning M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act," June 15, 1984 ("*Norden Determination*").

[26] *See* 45 Fed. Reg. 85,336, 85,338 (December 24, 1980).

404(a), the absence of available alternatives. But EPA cannot meet its burden during the veto proceeding by claiming that an applicant did not meet its burden during the permitting phase.[27] This is especially true where, as here, the permitting authority found that the applicant had met its permitting burden. JA 82. As EPA explained in the preamble to its 404(c) regulations:

> [T]he Administrator's authority . . . under Section 404(c) operates independently of [the Corps'] permitting authority in 404(a). . . . If the Administrator uses his 404(c) 'veto,' then he does have the burden to justify his action, but that burden does not come into play until he begins a 404(c) proceeding.

45 Fed. Reg. at 85,338. The Agency's administrative sleight-of-hand does not meet its burden of proof, and the Second Circuit, by failing to hold the Agency to its burden, undermines the regulatory scheme.[28]

CONCLUSION

Because the Second Circuit's endorsement of the market entry theory is inconsistent with the language of the Section 404(b)(1) guidelines and the purpose of Section 404 of the Act, because that theory provides no guidance to the regulated community, and because the lower court opinion creates enormous confusion for any private or public entity subject to Section 404 jurisdiction, the Petition for Certiorari should be granted.

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[27] Where an agency has the burden of proof, it must satisfy that burden by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *see Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 652-53 (1980) (agency cannot avoid its statutory burden by relying on policy that imposed burden on industry); *United Scenic Artists Local 829 v NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (agency cannot create a presumption on grounds of policy to avoid necessity for making findings required by statute).

[28] The Second Circuit properly declined to defer to EPA's interpre-

Respectfully submitted,

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tation in this case. 850 F.2d at 45; App. A 20a. The Corps and EPA disagree on the interpretation of the Section 404(b)(1) guidelines; therefore, the Court must use its own judgment in construing the regulations. *General Electric Co. v. Gilbert*, 429 U.S. 125, 144-145 (1976). Moreover, because the Corps is the permitting authority, and addresses the zoning, economic and financial issues implicated in the practicable alternatives analysis in 14,000 permit applications each year, deference to the Corps, not EPA, is warranted. *See National Association of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 821 (1983) (where statute divided ratemaking responsibility between two agencies, Court deferred to agency in which ratemaking authority was "vested primarily").

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APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

Nos. 852, 902, Dockets 87-6275, 87-6295.

John A. BERSANI, Newport Galleria Group, Robert J. Congel and the Pyramid Companies,
Appellants.

v.

Joseph ROBICHAUD and Citizens in Support of Attleboro Mall,
Intervenor-Plaintiffs-Appellants,

Home Building Association of Massachusetts,
Intervenor-Plaintiff.

United States Environmental Protection Agency, United States Army Corps of Engineers, Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency, Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency,
Appellees,

Sierra Club, Environmental Defense Fund, National Wildlife Federation, National Audubon Society, Conservation Law Foundation of New England, Inc., Massachusetts Audubon Society, Citizens for Responsible Environmental Management, Massachusetts Society for Conservation Professionals, Audubon Society of Rhode Island, Rhode Island Association of Conservation Commissioners and Natural Resources Defense Council,
Intervenor-Defendants.

Argued March 16, 1988.

Decided June 8, 1988.

On appeal from a judgment entered October 23, 1987 in the Northern District of New York, Thomas J. McAvoy, *District Judge*, 674 F.Supp. 405, granting appellee's motion for summary judgment and denying appellants' motion for summary judgment, in an action brought by developers to challenge the final determination of the Environmental Protection Agency denying them permission to construct a shopping mall on a swamp, the Court of Appeals, Timbers, Circuit Judge, held: (1) that EPA's "market entry" theory, considering availability of alternative sites at time developer entered the market for site instead of at time it applied for permit, was consistent with both regulatory language and past practice; and (2) that EPA's interpretation, while not necessarily entitled to deference, was reasonable and thus was properly upheld by district court.

Affirmed.

George C. Pratt, Circuit Judge, filed a dissenting opinion.

Albert J. Beveridge, III, Washington, D.C. (Gary H. Baise, Virginia S. Albrecht, Marc A. Zeppetello, David M. Friedland, and Beveridge & Diamond, Washington, D.C., on the brief), for appellants.

Paul D. Kamenar, Washington, D.C. (Daniel J. Popeo, Washington, D.C., and Henry M. Holzer, Brooklyn, N.Y., on the brief), for intervenor-appellants.

Donald A. Carr, Dept. of Justice, Washington, D.C. (Roger J. Marzulla, Acting Asst. Atty. Gen., Peter R. Steenland, Jr., Margaret N. Strand, Dept. of Justice, Gail B. Cooper, E.P.A., Washington, D.C., and Ann H. Williams-Dawe, E.P.A., Boston, Mass., on the brief), for appellees.

James T.B. Tripp, Environmental Defense Fund, New York City (Michael E. Herz, Environmental Defense Fund, New York City, Michael J. Bean, Environmental Defense Fund, Washington, D.C., Hope Babcock, National Audubon Society, Washington, D.C., Robert Dreher, Sierra Club Legal Defense Fund, Washington, D.C., Jerry Jackson, National Wildlife Federation, Washington, D.C., and Peter Shelley, Conservation Law Foundation of New England, Boston, Mass., on the brief), for intervenor-appellees.

R. Sarah Compton, Carl W. Schwarz, Kurt J. Olson, and McDermott, Will & Emery, U.S. Chamber of Commerce, Washington, D.C., and Robin S. Conrad, National Chamber Litigation Center, Washington, D.C., filed a brief as amicus curiae.

Before TIMBERS, PRATT and MINER, Circuit Judges.

TIMBERS, Circuit Judge:

Appellants John A. Bersani, the Pyramid Companies, Newport Galleria Group and Robert J. Congel ("Pyramid", collectively) appeal from a judgment entered October 23, 1987 in the Northern District of New York, Thomas J. McAvoy, *District Judge*, granting summary judgment in favor of appellees, the United States Environmental Protection Agency ("EPA"), the United States Army Corps of Engineers (the "Corps"), Lee Thomas, the Administrator of the EPA, Richard K. Dawson, Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, Assistant Administrator for External Affairs of the EPA (the "Federal Appellees" collectively), and denying Pyramid's motion for summary judgment. *Bersani v. EPA*, 674 F.Supp. 405 (N.D.N.Y. 1987).

This case arises out of Pyramid's attempt to build a shopping mall on certain wetlands in Massachusetts known as Sweedens Swamp. Acting under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982), EPA vetoed the approval

by the Corps of a permit to build the mall because EPA found that an alternative site had been available to Pyramid at the time it entered the market to search for a site for the mall. The alternative site was purchased later by another developer and arguably became unavailable by the time Pyramid applied for a permit to build the mall.

On appeal, the thrust of Pyramid's argument is a challenge to what it calls EPA's "market entry" theory, i.e., the interpretation by EPA of the relevant regulation, which led EPA to consider the availability of alternative sites at the time Pyramid entered the market for a site, instead of at the time it applied for a permit. Pyramid argues principally (1) that the market entry approach is contrary to the regulatory language and past practice; and (2) that since the Corps, another agency which was jointly responsible with EPA for administering the program in question, interpreted the pertinent regulation in a different way than EPA had, and since the market entry issue does not involve environmental expertise, this Court should not defer to EPA's interpretation of the regulation. Other subordinate claims are raised by appellants as well as by two intervenors and the amicus curiae.[1]

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[1] The amicus curiae, the United States Chamber of Commerce ("Chamber of Commerce") filed a brief in support of Pyramid's position. This brief raises two points also raised in Pyramid's brief, and one new point: that EPA exceeded its authority under § 404(c) by engaging in a *de novo* review of Pyramid's compliance with the regulation in question.

The Citizens in Support of Attleboro Mall and Joseph Robichaud ("Citizens", collectively) have intervened as plaintiffs/appellants and have submitted a brief raising two issues not covered by Pyramid in its brief: (1) whether EPA exceeded its authority under the relevant statute by considering the historical and cumulative effects of discharges on other wetlands, and (2) whether EPA arbitrarily rejected Pyramid's mitigation efforts.

The Conservation Law Foundation ("CLF") has intervened as a defendant/appellee and has submitted a brief raising six points, four of

We hold (1) that the market entry theory is consistent with both the regulatory language and past practice; (2) that EPA's interpretation, while not necessarily entitled to deference, is reasonable; and (3) that EPA's application of the regulation is supported by the administrative record. We agree with the district court's conclusion that EPA's findings were not arbitrary and capricious. We also hold that Pyramid's other arguments, and the arguments of one intervenor and the amicus, lack merit.

We affirm.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

A. *Statutory and Regulatory Framework*

One of the sections of the Clean Water Act (the "Act") relevant to the instant case is § 301(a), 33 U.S.C. § 1311(a) (1982), which prohibits the discharge of any pollutant, including dredged or fill materials, into the nation's navig-

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which are covered by the Federal Appellees in their brief. In the other two points, CLF: (1) answers the arguments of the Citizens and the Chamber of Commerce, asserting that EPA's decision was wholly within its authority, and (2) asserts that in any event the appropriate remedy for any defects in EPA's decision would be a remand.

Upon reviewing each of these new points, we hold (1) that EPA's decision was wholly within its authority, and (2) that EPA did not arbitrarily reject Pyramid's efforts at mitigation but rather had ample basis to reject these efforts on the ground that they were not likely to succeed. In light of our holding with regard to the district court's decision, discussed in the body of our opinion, we need not reach the issue of whether remand would be the appropriate remedy for defects in EPA's actions.

The other arguments of the two intervenors and the amicus will be dealt with in our discussion of the arguments of Pyramid and the Federal Appellees.

able waters, except in compliance with the Act's provisions, including § 404. It is undisputed that Sweedens Swamp is a "navigable water", as defined in 33 U.S.C. § 1362 (1982), and that Pyramid's shopping center proposal will involve the discharge of dredged or fill materials.

Section 404 of the Act, 33 U.S.C. § 1344 (1982 & Supp. III 1985), focusing on dredged or fill materials, provides that the United States Army and EPA will share responsibility for implementation of its provisions. EPA and the Corps also share responsibility for enforcing the Act. 33 U.S.C. §§ 1311 (1982), 1319 (1982), 1344(n) and (s) (1982). Section 404(a) authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of dredged or fill materials at particular sites. 33 U.S.C. § 1344(a) (1982). Section 404(b) provides that, subject to § 404(c), the Corps must base its decisions regarding permits on guidelines (the "404(b)(1) guidelines") developed by EPA in conjunction with the Secretary of the Army. 33 U.S.C. § 1344(b) (Supp. III 1985).

The 404(b)(1) guidelines, published at 40 C.F.R. Part 230 (1987), are regulations containing the requirements for issuing a permit for discharge of dredged or fill materials. 40 C.F.R. § 230.10(a)[2] covers "nonwater dependent activ-

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[2] Section 230.10(a)(2) and (3) provide:

"(a) Except as provided under section 404(b)(2) [pertaining to navigation] no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

• • •

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized expanded or managed in order to fulfill

ities" (i.e., activities that could be performed on non-wetland sites, such as building a mall) and provides essentially that the Corps must determine whether an alternative site is available that would cause less harm to the wetlands. Specifically, it provides that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative" to the proposal that would have a "less adverse impact" on the "aquatic ecosystem". It also provides that a practicable alternative may include "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." 40 C.F.R. 230.10(a)(2). It further provides that, "unless clearly demonstrated otherwise", practicable alternatives are (1) "presumed to be available" and (2) "presumed to have less adverse impact on the aquatic ecosystem". 40 C.F.R. 230.10(a)(3). Thus, an applicant such as Pyramid must rebut both of these presumptions in order to obtain a permit. Sections 230.10(c) and (d) require that the Corps not permit any discharge that would contribute to significant degradation of the nation's wetlands and that any adverse impacts must be mitigated through practicable measures.

In addition to following the 404(b)(1) guidelines, the Corps may conduct a "public interest review". 33 C.F.R. § 320.4 (1987). This public interest review is not mandatory

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the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site [defined in Subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise."

under § 404, unlike consideration of the 404(b) guidelines. In a public interest review, the Corps' decision must reflect the "national concern" for protection and use of resources but must also consider the "needs and welfare of the people." *Id.*

Under § 404(c) of the Act, 33 U.S.C. § 1344(c), EPA has veto power over any decision of the Corps to issue a permit. It is this provision that is at the heart of the instant case.

Specifically, § 404(c) provides that the Administrator of EPA may prohibit the specification of a disposal site "whenever he determines, after notice and opportunity for public hearings, that the discharge of materials into such area will have an unacceptable adverse effect" on, among other things, wildlife.[3] An "unacceptable adverse effect" is defined in 40 C.F.R. § 231.2(e) as an effect that is likely to result in, among other things, "significant loss of or damage to . . . wildlife habitat". The procedure under § 404(c) begins with the Regional Administrator ("RA") who, under § 231.3(a), must notify the Corps and the applicant when it is possible he will find an "unacceptable adverse effect". If within 15 days the applicant fails to satisfy the RA that no such effect will occur, the RA must publish his proposed determination to veto the grant of a permit.

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[3] Section 404(c), 33 U.S.C. § 1344(c), authorizes the Administrator:

"to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

A period for public comment and an optional public hearing follows, after which the RA either withdraws the determination or submits a recommended determination to the national Administrator, whose decision to affirm, modify or rescind the RA's recommendation is the final determination of EPA for purposes of judicial review. The burden of proving that the discharge will have an "unacceptable adverse effect" is on EPA. 45 Fed.Reg. 85,336, 85,338 (1980); 44 Fed. Reg. 58,076, 58,080 (1979).

In short, both EPA and the Corps are responsible for administering the program for granting permits for discharges of pollutants into wetlands under § 404. The Corps has the authority to issue permits following the 404(b)(1) guidelines developed by it and EPA; EPA has the authority under § 404(c) to veto any permit granted by the Corps. The Corps processes about 11,000 permit applications each year. EPA has vetoed five decisions by the Corps to grant permits.

B. *Factual Background of the Sweedens Swamp Project*

Sweedens Swamp is a 49.5 acre wetland which is part of an 80 acre site near Interstate 95 in South Attleboro, Massachusetts. Although some illegal dumping and motorbike intrusions have occurred, these activities have been found to have had little impact on the site which remains a "high-quality red maple swamp" providing wildlife habitat and protecting the area from flooding and pollution.

The effort to build a mall on Sweedens Swamp was initiated by Pyramid's predecessor, the Edward J. DeBartolo Corporation ("DeBartolo"). DeBartolo purchased the Swamp some time before April 1982. At the time of this purchase an alternative site was available in North Attleboro (the "North Attleboro site"). Since Massachusetts requires state approval (in addition to federal approval) for projects that would fill wetlands, DeBartolo applied to the Massachusetts Department of Environmental Quality Engineering ("DEQE") for permission to build

on Sweedens Swamp. DEQE denied the application in April 1982.

Pyramid took over the project in 1983 while the appeal of the DEQE denial was pending. In April 1983, Massachusetts adopted more rigorous standards for approval of permits. The new standards added wildlife habitat as a value of wetlands to be protected and required the absence of a "practicable alternative". In March 1985, DEQE granted approval under the old, less stringent, regulations. The Massachusetts District Court reversed on the ground that DEQE should have applied the new regulations, but the Massachusetts Supreme Judicial Court ultimately upheld DEQE's approval. *Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 511 N.E.2d 562 (1987).

One of the key issues in dispute in the instant case is just when did Pyramid begin searching for a suitable site for its mall. EPA asserts that Pyramid began to search in the Spring of 1983. Pyramid asserts that it began to search several months later, in September 1983. The difference is crucial because on July 1, 1983—a date between the starting dates claimed by EPA and Pyramid—a competitor of Pyramid, the New England Development Co. ("NED"), purchased options to buy the North Attleboro site. This site was located upland and could have served as a "practicable alternative" to Sweedens Swamp, *if* it had been "available" at the relevant time. Thus, if the relevant time to determine whether an alternative is "available" is the time the applicant is searching for a site (an issue that is hotly disputed), and if Pyramid began to search at a time *before* NED acquired options on the North Attleboro site, there definitely would have been a "practicable alternative" to Sweedens Swamp, and Pyramid's application should have been denied. On the other hand, if Pyramid did not begin its search until *after* NED acquired options on the North Attleboro site, then the site arguably was not "available" and the permit should have

been granted. Of course it also is possible that the North Attleboro site remained "available" after NED's acquisition of the options, since Pyramid arguably could have purchased the options from NED. Moreover, since the North Attleboro site indisputably was "available" when Pyramid's predecessor, DeBartolo, purchased Sweedens Swamp, one might argue, as EPA does, that Pyramid should be held to stand in its predecessor's shoes. The district court apparently agreed with Pyramid on the issue of when Pyramid entered the market, stating that "Pyramid initially became interested in developing a shopping mall in the Attleboro area in September 1983". *Bersani v. EPA, supra,* 674 F.Supp. at 409.

In December 1983, Pyramid purchased Sweedens Swamp from DeBartolo. In August 1984, Pyramid applied under § 404(a) to the New England regional division of the Corps (the "NE Corps") for a permit. It sought to fill or alter 32 of the 49.6 acres of the Swamp; to excavate nine acres of uplands to create artificial wetlands; and to alter 13.3 acres of existing wetlands to improve its environmental quality. Later Pyramid proposed to mitigate the adverse impact on the wetlands by creating 36 acres of replacement wetlands in an off-site gravel pit.

During the review of Pyramid's application by EPA, by the Fish and Wildlife Service ("FWS") and by the Corps, Pyramid submitted information on "practicable alternatives", especially the North Attleboro site. In rejecting that site as an alternative, Pyramid asserted that building a mall there was not *feasible,* not that the site was *unavailable.* In the words of the district court, Pyramid claimed that

> "the site lacked sufficient traffic volume and sufficient access from local roads, potential department store tenants had expressed strong doubts about the *feasibility* of the site and previous attempts to develop

> the site had met with strong resistance from the surrounding community."

Bersani, supra, 674 F.Supp. at 410 (emphasis added).

In November 1984, EPA and FWS submitted official comments to the NE Corps recommending denial of the application because Pyramid's proposal was inconsistent with the 404(b)(1) guidelines. Pyramid had failed (1) to overcome the presumption of the availability of alternatives and (2) to mitigate adequately the adverse impact on wildlife. EPA threatened a § 404(c) review. Pyramid then proposed to create additional artificial wetlands at a nearby upland site, a proposal it eventually abandoned.

In January 1985, the NE Corps hired a consultant to investigate the feasibility of Sweedens Swamp and the North Attleboro site. The consultant reported that either site was feasible but that from a commercial standpoint only one mall could survive in the area. On February 19, 1985, the NE Corps advised Pyramid that denial of its permit was imminent. On May 2, 1985, the NE Corps sent its recommendation to deny the permit to the national headquarters of the Corps. Although the NE Corps ordinarily makes the final decision on whether to grant a permit, *see* 33 C.F.R. § 325.8 (1982), in the instant case, because of widespread publicity, General John F. Wall, the Director of Civil Works at the national headquarters of the Corps decided to review the NE Corps' decision. Wall reached a different conclusion. He decided to grant the permit after finding that Pyramid's offsite mitigation proposal would reduce the adverse impacts sufficiently to allow the "practicable alternative" test to be deemed satisfied. He stated:

> "In a proper case, mitigation measures can be said to reduce adverse impacts of a proposed activity to the point where there is no 'easily identifiable difference in impact' between the proposed activity (in-

cluding mitigation) versus the alternatives to that activity."

Although he did not explicitly address the issue, Wall apparently assumed that the relevant time to determine whether there was a practicable alternative was the time of the application, not the time the applicant entered the market. In other words, Wall appears to have assumed that the market entry theory was not the correct approach. For example, while addressing the traditional "practicable alternatives" analysis as an alternative ground for his decision, Wall found that the North Attleboro site was unavailable "because it has been optioned by another developer". Since the site was *not* optioned at the time EPA argues Pyramid entered the market, this language suggests (to Pyramid at least) that Wall could not have been employing the market entry approach.

On May 31, 1985, Wall ordered the NE Corps to send Pyramid, EPA and FWS a notice of its intent to grant the permit. The NE Corps complied on June 28, 1985.

On July 23, 1985, EPA's RA initiated a § 404(c) review of the Corps' decision. Following the procedure set forth in 40 C.F.R. Part 231 (discussed above), EPA published notice of its intent to prohibit the project in the *Federal Register;* held a public hearing on September 26, 1985; and permitted a period for public comment which closed on October 4, 1985. A second hearing was held on November 18, 1985.

On March 4, 1986, the RA recommended that EPA veto the permit because of adverse impacts on wildlife and available "practicable alternatives". In particular, the RA found that Pyramid had not overcome the presumption that an alternative existed, in part because Pyramid had failed to provide information on the availability of the North Attleboro site. After first refusing to provide the information, Pyramid later had claimed "there is no further or more detailed information. It simply does not

exist." The RA alternatively reasoned that the North Attleboro site had been available to DeBartolo, and that EPA should attribute this availability to Pyramid because Pyramid had benefitted from DeBartolo's application for state approval.

On May 13, 1986, EPA issued its final determination, which prohibited Pyramid from using Sweedens Swamp. It found (1) that the filling of the Swamp would adversely affect wildlife; (2) that the North Attleboro site could have been available to Pyramid at the time Pyramid investigated the area to search for a site; (3) that considering Pyramid's failure or unwillingness to provide further materials about its investigation of alternative sites, it was uncontested that, at best, Pyramid never checked the availability of the North Attleboro site as an alternative; (4) that the North Attleboro site was feasible and would have a less adverse impact on the wetland environment; and (5) that the mitigation proposal did not make the project preferable to other alternatives because of scientific uncertainty of success. In the second of these findings, EPA used what Pyramid calls the "market entry" approach.

On July 1, 1986, Pyramid commenced the instant action in the district court to vacate EPA's final determination as arbitrary and capricious. After the parties filed cross-motions for summary judgment, the newspapers reported that Pyramid intended to enter a joint venture with NED to build a mall at the North Attleboro site. Affidavits submitted concerning this development did not indicate whether Pyramid planned to continue the Sweedens Swamp project. Since the joint venture agreement was still in draft form, EPA did not take the position that the case was moot.

On October 6, 1987, the court granted EPA's motion for summary judgment. The court stated that, with regard

to the market entry theory, EPA's interpretation of its regulations was entitled to deference. This appeal followed.

For the reasons which follow, we affirm.

II.

One of Pyramid's principal contentions is that the market entry approach is inconsistent with both the language of the 404(b)(1) guidelines and the past practice of the Corps and EPA.

A.

With regard to the language of the regulations, Pyramid reasons that the 404(b)(1) guidelines are framed in the present tense, while the market entry approach focuses on the *past* by considering whether a practicable alternative *was* available at the time the applicant entered the market to search for a site. To support its argument that the 404(b)(1) guidelines are framed in the present tense, Pyramid quotes the following language:

> "An alternative is practicable if it *is* available. . . . If it is otherwise a practicable alternative, an area not *presently* owned by the applicant which *could* reasonably *be* obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity *may be* considered."

40 C.F.R. § 230.10(a)(2) (emphasis added). It then argues that EPA says "is" means "was". It cites *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 108 S.Ct. 376, 381 (1987), to indicate that the Supreme Court believes that the "most natural" reading of present tense langauge in § 505(a) of the Act refers only to the present and future.

While this argument has a certain surface appeal, we are persuaded that it is contrary to a common sense reading of the regulations; that it entails an overly literal and

narrow interpretation of the language; and that it creates requirements not intended by Congress.

First, while it is true that the language is in the present tense, it does not follow that the "most natural" reading of the regulations would create a time-of-application rule. As EPA points out, "the regulations do not indicate *when* it is to be determined whether an alternative 'is' available," (emphasis in original), i.e., the "present" of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times. Based upon a reading of the language in the context of the controlling statute and the regulations as a whole, moreover, we conclude that when the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit. We therefore agree with the district court that the regulations are essentially silent on the issue of timing and that it would be appropriate to consider the objectives of the Act and the intent underlying the promulgation of the regulations. *Bersani, supra,* 674 F.Supp. at 412.

Second, as EPA has pointed out, the preamble to the 404(b)(1) guidelines states that the purpose of the "practicable alternatives" analysis is "to recognize the special value of wetlands and to avoid their unnecessary destruction, particularly where practicable alternatives *were* available in non-aquatic areas to achieve the basic purpose of the proposal." 45 Fed. Reg. 85,338 (1980) (emphasis added). In other words, the purpose is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site. Pyramid's reading of the regulations would thwart this purpose because it would remove the incentive for a developer to search for an alternative site at the time such an incentive is needed, i.e., at the time it is making the decision to select a par-

ticular site. If the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear. Conversely, in a case in which alternatives were not available at the time the developer made its selection, but became available by the time of application, the developer's application would be denied even though it could not have explored the alternative site at the time of its decision.

Pyramid attacks this reasoning by arguing that few developers would take the risk that an available alternative site would become unavailable and that EPA's reading improperly considers the motives and subjective state of mind of the applicant. These arguments are wide of the mark. Whether most real-life developers would take such a risk is irrelevant. The point is that Pyramid's time-of-application theory is completely at odds with the expressed intent of the regulations to provide an incentive to avoid choosing wetlands. Similarly, EPA's interpretation does not require courts to investigate the subjective state of mind of a developer. EPA discusses state-of-mind issues only because it is discussing the *purpose* behind the regulations, which is concerned with incentives, and thus in fact is indirectly concerned with the developer's state of mind.

In short, we conclude that a common-sense reading of the statute can lead only to the use of the market entry approach used by EPA.

B.

With regard to the past practice of the Corps and EPA, Pyramid asserts that neither has ever applied a market entry approach. It first cites two previous final determinations of EPA, known as the "Final Determination of the Assistant Administrator for External Affairs Concern-

ing the Jack Maybank Site on Jehossee Island, South Carolina Pursuant to Section 404(c) of the Clean Water Act," April 5, 1985 ("Maybank Determination"), and the "Final Determination of the Administrator Concerning M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act," June 15, 1984 ("Norden Determination"). On the basis of these determinations, Pyramid argues that, had EPA been using a market entry approach in these cases, it would have examined whether alternatives were available at earlier times and that EPA had failed to make such an examination. Pyramid also cites *National Audubon Society v. Hartz Mountain Dev. Corp.*, 14 Envtl.L. Rep. 20724 (Envtl.L.Inst.) (D.N.J. Oct. 24, 1983), *Friends of the Earth v. Hintz*, 800 F.2d 822 (9 Cir.1986), and *Hough v. Marsh*, 557 F.Supp. 74 (D.Mass.1982), as examples of cases in which courts have upheld Corps decisions which had examined only those practicable alternatives that were available at the time of the permit review.

Our examination of these prior decisions has satisfied us, however, that the issue raised in the instant case simply has not been addressed before. In *National Audubon Society*, the actual issue was whether the alternative site had to be available to the applicant or any developer. In *Hintz*, the court, while addressing other issues, simply approved a Corps decision in which only those alternatives available at the time of the review were considered. In *Hough*, the court invalidated a permit not because the Corps had considered past alternatives but rather because it assumed that such alternatives continued to exist during the entire selection process. Similarly, the Maybank Determination in fact addressed another issue. In the Norden Determination, where about 40 possible alternative sites were identified, of which seven were available at the time of application, EPA did not address the timing issue explicitly, because it was not required to—the presence of the seven currently available alternatives made it unnecessary to reach the issue.

We believe that the issue essentially is one of first impression. We view EPA's action in the instant case as an application of the regulatory language to the specific needs of this case which arose here for the first time. We therefore hold that EPA has not acted contrary to prior practice under the regulations.

III.

We turn next to the issue of whether EPA's interpretation of the 404(b)(1) guidelines is entitled to the deference usually accorded an agency with regard to its interpretation of regulations it is charged with administering, *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980), and participated in formulating. *See also United States v. Hescorp. Heavy Equip. Sales Corp.*, 801 F.2d 70, 76 (2 Cir.), *cert. denied*, 107 S.Ct. 672 (1986). The district court implied in its decision that it was according EPA such deference in examining its market entry approach.

Pyramid contends that such deference was unwarranted because two agencies—EPA and the Corps—developed and administered the regulations, and the Corps reached a different conclusion from that of EPA on the market entry issue. It asserts that, contrary to EPA's market entry approach, the "Corps' position is that the availability should be determined as of the time an application is under review." Pyramid points out that under § 404(b) the regulations are to be developed by EPA "in conjunction with" the Secretary of the Army (who acts through the Corps). It cites *General Elec. Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976), for the proposition that a court must use its own judgment in construing a regulation when two agencies with responsibility for administering it reach divergent conclusions. It also contends that the Corps has greater experience with and expertise in assessing the "availability" of alternatives than EPA, because it is the Corps that makes the initial decision on thousands of applications while

EPA reviews under § 404(c) only rarely. Furthermore, Pyramid claims that the availability analysis implicates zoning, economic and financial issues, not environmental ones.

In response, EPA asserts that the Corps did not take a developed opposing policy position on the issue of what time is relevant in the "practicable alternatives" analysis. The reason for this is that the Corps, acting through General Wall, based its decision primarily on its finding that Pyramid's mitigation proposal was workable. EPA also asserts, on the issue of its expertise, that its "selective and most infrequent invocation" of its veto power underscores EPA's "seriousness" about using the veto. Finally EPA asserts that the Act's legislative history indicates that Congress intended EPA to have the "final word" on any disputes with the Corps.

While none of EPA's assertions is entirely persuasive, there also are difficulties with Pyramid's position. It is undeniable, for example, that Wall in fact did find that the North Attleboro site was "unavailable" and thus it appears that the Corps tacitly was applying a time-of-application test. On the other hand, it is possible that Wall believed that Pyramid did not enter the market until after NED had purchased the North Attleboro site. Accordingly, Wall may have found the alternative site "unavailable" under the market entry approach. Pyramid's and EPA's other arguments similarly cut both ways or are inconclusive.

Even if we are not thoroughly persuaded that EPA's interpretation was entitled to deference, however, we nevertheless conclude that the district court's decision in its favor must be upheld. As Pyramid itself points out (to the detriment of its argument), the issue of deference is separate from the issue of the standards of review of the district court and of our Court.

On appeal, we must subject the district court's judgment to plenary review, *Potenze v. New York Shipping Ass'n*,

804 F.2d 235, 239 (2 Cir.1986), *cert. denied*, 107 S.Ct. 1955 (1987), and apply the same summary judgment test as applied by the district court. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9 Cir.1987). An agency's interpretation of its own regulations raises a question of law, *White Indus. v. FAA*, 692 F.2d 532, 534 (8 Cir.1982), and thus is freely reviewable by our Court. *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5 Cir.1986).

The standard of review for the district court in this case is that the court shall set aside EPA's findings, conclusions or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982). As stated by the Supreme Court in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983),

> "[A] reviewing court may not set aside agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. . . . The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' "

Id. at 42-43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Applying these standards, we are convinced that EPA's market entry interpretation was reasonable, and therefore was neither "arbitrary and capricious" nor "not in accordance with law." We therefore hold that the district court correctly found that EPA's interpretation of the regulations was reasonable.

IV

Finally, we turn to Pyramid's subordinate claims, three of which warrant brief mention. Pyramid claims (1) that the market entry theory violates administrative law principles because it is not specific enough to put the public on notice of when it must consider alternative sites; (2) that EPA's application of the market entry theory was unfair in this case; and (3) that the district court exceeded its authority in supplying a rationale for EPA's decision which was not offered by EPA.

As for the claim that the market entry approach is not specific enough, Pyramid reasons that any number of points in time could constitute "entry" into the market. It speculates whether market entry occurs "from the time the first internal memorandum is written," or the time "the first consultant [is] hired," or the time the "first negotiation for a site [is] conducted." We are persuaded, however, that EPA is correct in asserting that it is unnecessary to pin down the standard to such a degree and that it would confuse things further to attempt to do so. Since the point of "entry" necessarily will vary from case to case, we believe the concept of "market entry" is the best method and is specific enough to put a developer on notice of when it should be considering alternative sites.

With regard to the claim that EPA applied the market entry approach unfairly in the instant case, Pyramid asserts that the way EPA announced a "new" standard (the market entry rule) and then applied it "retroactively" in this case was fundamentally unfair. It also asserts that EPA's failure to address evidence that the North Attleboro site was unavailable at the time of Pyramid's market entry was unfair. According to Pyramid, such fundamental unfairness violates the principles underlying the Administrative Procedure Act. *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

As we held above, however, we view EPA's interpretation of the rules as a reasonable application of the regulatory language to the unique facts of this case—a case in which it became necessary for the first time to reach the issue of *when* availability should be determined. EPA did not create and announce a "new" standard and apply it retroactively to Pyramid. Rather, EPA interpreted the law to apply it to the facts of this case.

Moreover, we believe the extensive administrative record supports a finding that the North Attleboro site was available to Pyramid when it entered the market. Even if Pyramid were found not to have entered the market until September 1983, after NED had acquired options to purchase the North Attleboro site, it does not necessarily follow that the site was unavailable. Aside from the fact that NED did not acquire all the options for the North Attleboro site until June 1984, it also was possible for Pyramid to attempt to purchase the options from NED. The record shows no such attempts to purchase the site, or even to investigate its availability. Alternatively, even though the district court apparently was not persuaded by it, there also is evidence in the record to show that Pyramid actually entered the market in the Spring of 1983, before NED had purchased its options. Finally, the evidence shows that the North Attleboro site had been available to DeBartolo, Pyramid's predecessor. EPA could reasonably have determined that Pyramid should be held to "stand in the shoes" of DeBartolo, especially since it was able to obtain state approval of the project under the less-stringent state standards that had originally applied to DeBartolo.

Finally, Pyramid contends that the district court improperly supplied a rationale for EPA's final determination that EPA itself did not articulate. It is true that the district court rejected one of EPA's grounds for finding that Pyramid had failed to rebut the presumption that a practicable alternative was available. This ground was that the

"trade custom" of developers was to investigate a potential development site for many months before purchasing it. EPA reasoned that, if Pyramid had purchased Sweedens Swamp in December 1983, it was unlikely, in view of the trade custom, that it had entered the market only eight weeks earlier—in September 1983—as Pyramid claimed. The court accepted what it characterized as EPA's finding that the North Attleboro site in any event was still available in September 1983, when even Pyramid admitted it had entered the market.

Pyramid asserts that EPA did not make this finding and that the court improperly supplied a rationale for EPA's determination that EPA did not articulate itself. This assertion fails, however, because EPA *did* make the finding. In its final determination it stated several reasons why it believed the North Attleboro site should be deemed to have been "available". It stated, among other things, (1) that NED could "have been talked into relinquishing its interest" in the site even in September or December 1983; (2) that Pyramid never investigated the availability of the North Attleboro site because it believed it was too far from the highway; and (3) that Pyramid had refused to provide EPA with information on the time of its entry into the market, stating that such information "simply does not exist". Thus, the trade custom ground to support the finding of availability was accompanied by several other grounds in the final determination. The district court therefore did not "supply" a rationale for EPA. Rather, EPA supplied several for itself.

We affirm the district court's decision in all respects.

V.

To summarize:

We hold (1) that the market entry theory is consistent with both the regulatory language and past practice; (2) that EPA's interpretation, while not necessarily entitled

to deference, is reasonable and its application of its rule is supported by the record; and (3) that Pyramid's other arguments lack merit.

Affirmed.

GEORGE C. PRATT, Circuit Judge, dissenting:

Finding that a "common-sense reading" of 33 U.S.C. § 1344(c) "can lead only to the use of the market entry approach", the majority today holds that in determining whether an "alternative *is* available", EPA is to look, not at the present circumstances and most current data, but rather at circumstances and data which existed, perhaps years earlier, when the developer "entered the market". This market entry theory approaches a sensitive environmental problem through a time warp, it ignores the statute's basic purpose, and it creates unfair and anomalous results. I therefore dissent.

I. *The Legislative History and Purpose of Section 1344.*

Section 1344 was enacted by congress in 1972 as part of a broad-based improvement to a national water policy that had been, as congress termed it, "inadequate in every vital aspect." S.Rep. No. 414, 92 Cong., 2d Sess. 7 (1972). Specifically, the section was intended to address the delicate balance between those activities which endanger "marine environment [and] ecological systems" on the one hand, and those activities "essential for the maintenance of interstate and foreign commerce" on the other. Conf.Rep. No. 1236, 92nd Cong., 2d Sess. 43-44 (1972).

Section 1344 is unusual: its primary purpose is neither to punish those who illegally infringe on national wetlands, nor, as the majority opines, "to provide an incentive [to developers] to avoid choosing wetlands". To the contrary, the statute is directed at the land itself without any regard to whether the party seeking to develop it has clean hands. Thus, if the "biological integrity" of a specific wetland

area outweighs the "interstate and foreign commerce" advantages that the site could provide, the site should remain undeveloped regardless of which developer is seeking the permit. *See* S.Rep. No. 414, 92nd Cong., 2d Sess. 7 (1972); Conf.Rep. No. 1236, 92nd Cong., 2d Sess. 43-44 (1972). Conversely, if the balance weighs in favor of commerce or other economic advantages, then the land should be developed, again regardless of the specific developer involved. *Id.* In short, congress designed the section to preserve the environment consistent with reasonable accommodation to the economic and social needs of the public; it was not concerned with the identities or past activities of particular developers.

II. *The Purpose of Section 1344 and the Market Entry Theory.*

In this case I have no problem with EPA's basic approach. It conscientiously attempted to weigh the economic advantages against the ecological disadvantages of developing Sweedens Swamp and, in approaching this determination, it properly looked to alternate available sites. However, EPA went wrong—seriously wrong—when it adopted the market entry theory to decide whether an alternate site was available. By focusing on the decision-making techniques and tactics of a particular developer, instead of the actual alternatives to disturbing the wetland, EPA ignored the statute's central purpose.

The market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved. Under the market entry theory, developer A would be denied a permit on a specific site because when he entered the market alternatives were available, but latecomer developer B, who entered the market after those alternatives had become unavailable, would be entitled to a permit for developing the same site. In such a case, the theory no longer protects the land, but instead becomes

a distorted punitive device: it punishes developer A by denying him a permit, but grants developer B a permit for the same property—and the only difference between them is when they "entered the market".

The market entry theory has further problems. In this case, for example, if a Donald Trump had "entered the market" after NED took the option on the North Attleboro site and made it unavailable, under EPA's approach he apparently would have been entitled to a permit to develop Sweedens Swamp. But after obtaining the permit and the land, could Trump then sell the package to Pyramid to develop? Or could he build the mall and then sell the developed site to Pyramid? If, on the one hand, the answer to these questions is "yes", then the market entry theory is no more than a troublesome mirage that could easily be circumvented by Pyramid's using a second party to buy the land and obtain the permit. If, on the other hand, the answer is "no", then Pyramid is forever tainted, forever prohibited—somewhat like a bill of attainder—from owning this particular site, and only because at some time in the past it had "entered the market" while an alternative was still available.

Furthermore, in a business that needs as much predictability as possible, the market entry theory will regrettably inject exquisite vagueness. When does a developer enter the market? When he first contemplates a development in the area? If so, in what area—the neighborhood, the village, the town, the state or the region? Does he enter the market when he first takes some affirmative action? If so, is that when he instructs his staff to research possible sites, when he commits money for more intensive study of those sites, when he contacts a real estate broker, when he first visits a site, or when he makes his first offer to purchase? Without answers to these questions a developer can never know whether to proceed through the expense of contracts, zoning proceedings, and EPA applications. Such a vague standard as "market entry" falls

far short of the requirement that an agency articulate its standards with sufficient clarity so that the affected community may know what those standards are. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 48 (1983); *Port Terminal Railroad Ass'n v. United States*, 551 F.2d 1336, 1344-45 (5th Cir. 1977).

Even more important, the result reached by EPA and the majority is contrary to what congress sought to achieve when it passed § 1344. Pyramid has been "punished" for beginning its quest when the North Attleboro site was still available; but Sweedens Swamp nevertheless could be destroyed through an identical application by some other developer who happened to enter the market after that alternate site became unavailable. And this would be so even if another, better-suited site should become available after the second developer enters the market, because the "common sense" market entry theory looks only, and blindly, to the alternatives available at the time the applicant "entered the market".

III. *The Proper Theory for Determining Whether an Alternate Site is Available.*

Since congress delegated to EPA the responsibility for striking a difficult and sensitive balance among economic and ecological concerns, EPA should do so only after considering the circumstances which exist, not when the developer first conceived of his idea, nor when he entered the market, nor even when he submitted his application; rather, EPA, like a court of equity, should have the full benefit of, and should be required to consider, the circumstances which exist at the time it makes its decision. This is the only method which would allow EPA to make a fully informed decision—as congress intended—based on whether, at the moment, there is available a site which can provide needed economic and social benefits to the public, without unnecessarily disturbing valuable wetlands.

Such a "time of decision" theory is reinforced by the present-tense language of the regulation, which commands EPA to determine whether an alternate site "is available". *See Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 108 S.Ct. 376, 381 (1987) (present tense language in regulation means agency should apply that regulation to present, not past, circumstances). It is also supported by the express statements of congress when it passed the statute, and, I would submit, by true "common sense". Any agency given the unenviable task of balancing essentially incomparable factors in determining what is in the public's best interest, should look to the most up-to-date data, and evaluate the most current circumstances. Any other analysis would effectively tie the agency to an irrelevant date in the past, when the question to be decided is how to balance the environmental and commercial interests of the present and the future.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

8 June, 1988

RE: BERSANI v EPA

Docket No.: 87-6275, 87-6295

Gentlemen:

The court has rendered a decision in the above-entitled case. The decision of the district court has been
Judgment affirmed by published signed opinion.
Dissenting by published signed opinion.
Judgment filed.

A copy of the opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with §0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue only to the District Court in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH, Clerk

by /s/ DONNA J. MORGAN
Deputy Clerk

APPENDIX B

CLERK'S OFFICE
United States District Court
FOR THE
ND/NY

Civil Action No. 85-CV-772

John A. Bersani, et al

vs.

U.S. EPA, et al

There was entered on the docket Oct. 23, 1987

JUDGMENT: Defts' motionf/summary judgment is granted;
Pltfs' motion f/summary judgment is denied.

J.R. SCULLY, CLERK

UNITED STATES DISTRICT COURT,
N.D. New York.

No. 86-CV-772.

John A. BERSANI, Newport Galleria Group, Robert J. Congel and the Pyramid Companies,

Plaintiffs,

and

Citizens in Support of Attleboro Mall and Joseph Robichaud,

Intervenor-Plaintiffs,

and

Home Builders Association of Massachusetts,

Intervenor-Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; United States Army Corps of Engineers; Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency; Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army; and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency,

Defendants,

and

Conservation Law Foundation of New England, Environmental Defense Fund, National Audubon Society, Sierra

Club Legal Defense Fund, and National Wildlife Federation, Intervenor-Defendants.

Oct. 6, 1987

Shopping mall developers brought action to challenge final determination of Environmental Protection Agency that denied permission to construct shopping mall on swamp. Agency moved for summary judgment. The District Court, McAvoy, J., held that: (1) Agency could consider avoidability of loss in conjunction with its magnitude in determining whether environmental effect was unacceptable and significant; (2) Agency properly concluded that alternative to construction of mall on swamp was feasible and available; and (3) Agency did not act arbitrarily in concluding that significant loss of wildlife resources would result from construction of mall on swamp.

Motion granted.

Beveridge & Diamond, P.C., Washington, D.C., Levine, Gouldin & Thompson, Binghamton, N.Y., for plaintiffs; Gary H. Baise, Virginia S. Albrecht, Marc Zeppetello, Washington, D.C., David M. Gouldin, Binghamton, N.Y., of counsel.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Boston, Mass., for intervenor-plaintiff Home Builders Ass'n of Massachusetts; Michael S. Gardener, of counsel.

Paul D. Kamenar, Washington, D.C., for intervenor-plaintiffs Citizens in Support of Attleboro Mall and Joseph Robichaud.

Lawrence R. Liebesman, U.S. Dept. of Justice, Land and Natural Resources Div., Washington, D.C, for defendants.

Gail B. Cooper, Office of General Counsel, E.P.A., Washington, D.C., for defendants.

Ann Williams-Dawe, Boston, Mass., for defendants U.S. E.P.A.

James T.B. Tripp, New York City, for defendant-intervenor Environmental Defense Fund.

Robert Dreher, Washington, D.C., for defendant-intervenor Sierra Club Legal Defense Fund.

McDermott, Will & Emery, Washington, D.C., for amicus curiae United States Chamber of Commerce; R. Sarah Compton, of counsel.

Chernin & Gold, Binghamton, N.Y., for amicus curiae U.S. Chamber of Commerce; Donald M. Flanagan, of counsel.

DECISION AND ORDER

McAVOY, District Judge.

Plaintiffs John A. Bersani, the Pyramid Companies[1], Robert J. Congel and the Newport Galleria Group[2] have brought this action challenging a "Final Determination" rendered by the defendant United States Environmental Protection Agency (the "EPA") on May 13, 1986, pursuant to Section 404(c) of the Clean Water Act, 33 U.S.C. section 1344(c).[3] This Final Determination vetoed a decision rendered by the defendant United States Army Corps of Engineers (the "Corps") in June 1985, which decision granted Pyramid permission to construct a shopping mall in certain wetlands, known as "Sweden's Swamp," located in South Attleboro, Massachusetts. Pyramid seeks an order from

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[1] Pyramid is an association of partnerships which is in the business of developing, constructing and operating shopping centers in the Northeastern United States.

[2] The plaintiffs will be collectively referred to as "Pyramid."

[3] The EPA Administrator delegated the authority to make a final decision regarding permits issued under Section 404(a) of the Act to the Assistant Administrator of External Affairs at the time of the proceeding at issue. This final determination constitutes final agency action under Section 404(c) of the Act for the purposes of judicial review. 40 C.F.R. sections 231.5 and 231.6.

this Court vacating the EPA's determination on the grounds that it is arbitrary, capricious and otherwise not in accordance with the law. *See* 5 U.S.C. sections 704, 706. The court has before it plaintiffs' and defendants' cross-motions for summary judgment.[4]

BACKGROUND

1. Statutory and Regulatory Framework

The Clean Water Act (the "Act"), 33 U.S.C. sections 1251 *et seq.*, the basic federal legislation controlling water pollution, embodies Congress' effort to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. section 1251. Section 301(a) of the Act, 33 U.S.C. section 1311(a), forbids the discharge of any pollutant into "navigable waters"[5] unless permitted by the Army Corps of Engineers pursuant to Section 404. *See* 33 U.S.C. section 1344.

Section 404(a) authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of dredged or fill material at specified disposal

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[4] Both Intervenor-Plaintiffs and Intervenor-Defendants have submitted motions for summary judgment. The arguments of the former are incorporated into the discussion concerning the plaintiffs' motion and the arguments of the latter are incorporated into the discussion regarding the defendants' motion.

Oral argument on these motions was heard by this court on April 2, 1987. Thereafter, Intervenor-Defendants' raised the question of whether this lawsuit was moot. After three months of discovery, the parties withdrew their assertion of mootness.

[5] Section 502 of the Act defines navigable waters as "waters of the United States." 33 U.S.C. section 1362(7). There is no dispute that the wetlands comprising Sweden's Swamp are navigable waters. *See* 33 C.F.R. section 323.2. Nor is there any dispute that the plaintiff's proposal involves the discharge of dredged and fill materials, which are pollutants within the meaning of the Act, into those waters. *See* 33 U.S.C. section 1362(6) (pollutant includes dredged spoil).

sites. 33 U.S.C. section 1344(a). Criteria known as the Section 404(b) guidelines developed by the EPA, in conjunction with the Corps, govern these permitting decisions. 33 U.S.C. section 1344(b).[6] Generally, the Corps must employ a "practicable alternative" analysis in determining whether to allow a proposed discharge. 40 C.F.R. section 230.10 provides, in part:

> (a) Except as provided under section 404(b)(2) [pertaining to navigation] **no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem**, so long as the alternative does not have other significant adverse environmental consequences.
>
> (2) **An alternative is practicable if it is available and capable of being done, after taking into account cost, existing technology, and logistics in light of overall project purposes**. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.
>
> (3) Where the activity associated with a discharge which is proposed for a special aquatic site [defined in Subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), **practicable alternatives that do not involve special aquatic sites are presumed to be available unless clearly demonstrated otherwise**. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to

[6] The section 404(b)(1) guidelines are published at 40 C.F.R. Part 230.

> have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

40 C.F.R. sections 230.10(a)(2) and (3) (emphasis added).[7]

When the proposed discharge involves a special aquatic site such as wetlands, a more stringent standard is imposed. Indeed, Section 230.10(a)(3) creates a presumption that a practicable alternative exists when the discharge involves wetlands and the activity, here a shopping mall, is not "water dependent." Then the applicant must "clearly demonstrate" that no such alternative does in fact exist.

Section 404(c) grants the Administrator of the EPA authority to prohibit, deny or restrict a Corps-issued permit for the use of a specific site when the Administrator determines that the proposed discharge "will have **an unacceptable adverse effect on** municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), **wildlife**, or recreational areas." 33 U.S.C. section 1344(c) (emphasis added). An "unacceptable adverse effect" is one which has an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or **significant loss of or damage to** fisheries, shellfishing, or **wildlife habitat** or recreation areas." 40 C.F.R. section 231.2(e) (emphasis added). This "veto" power must be exercised in accordance with established procedure. *See* 40 C.F.R. Part 231.

2. Procedural History

Pyramid initially became interested in developing a shopping mall in the Attleboro area in September 1983, and

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[7] The other Section 404(b)(1) criteria which must be satisfied before a permit may issue are (1) compliance with other applicable laws, (2) the absence of significant degradation of the Nation's waters, and (3) the adequate mitigation of potential adverse impacts. *See* 40 C.F.R. sections 230.10(b)-(b).

focused its attention on an 82-acre site in South Attleboro about one-fourth mile north of the Rhode Island border. Although the project contemplated altering or filing 32.2 acres of 49.6 acres of wetlands, the plan also called for excavating 9.0 acres of uplands (non-wetlands) to create new wetlands and altering an existing 13.3 acres of wetlands to enhance its value for wildlife, fisheries and other quality maintenance.[8] Another 4.0 acres of existing wetlands would remain undisturbed.[9] Upon completion of construction, 26 acres of wetlands including marsh areas, red maple swamp and open water would remain. Additionally, Pyramid proposed an off-site mitigation project which would result in the creation of 36 acres of replacement wetlands in an abandoned gravel pit.[10]

State Proceedings

In April 1982, the Massachusetts Department of Environmental Quality Engineering (MDEQE) denied state permission to construct a mall at the Sweden's Swamp site to Pyramid's predecessor, the Edward J. DeBartolo Corporation. The DeBartolo Corporation requested an adjudicatory hearing, prior to which Pyramid assumed control of the project. In March 1985, the MDEQE issued a

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[8] The May 13, 1986 Final Determination of the Assistant Administrator for External Affairs (FD) is document H-119 in the certified index to the Administrative Record. The March 5, 1986, Recommendation of the EPA Regional Administrator (RD) is document B-25 in the certified index. The Statement of Findings and Environmental Assessment of the Corps (SOF/EA) is document B-16 in the certified index. All other documents will be referred to by the number assigned them in the certified index.

[9] The alteration of these additional 13.3 acres is necessary to provide onsite capability for storage and treatment of stormwater runoff from the development. FD, Plaintiff's Exhibit B, at 5; B-2, "Section 404 Application," at 31-64.

[9] SEOF/EA at 1.

[10] FD at 5; C-54, "Final Report on Mitigation Site," at 1-6.

Superseding Order of Conditions which overturned the initial denial and authorized the project.[11] This decision was appealed on the ground that the MDEQE had improperly reviewed Pyramid's project under the state's 1978 wetlands protection regulations rather than under the more stringent regulations which had taken effect in April 1983. On September 30, 1986, a state court rule that the MDEQE's decision to grandfather the project was error and remanded the matter to the MDEQE to determine the rights of the parties under the 1983 regulations. As a consequence of this ruling, the new regulations, which prohibit the filling of more than 5,000 square feet of bordering vegetated wetlands, applied to Pyramid's proposal, *see Laurie Carroll v. DEQE,* No. 76012, (Mass.Super.Ct. September 30, 1986), and barred its implementation. This decision was reversed on appeal. *See Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.,* 400 Mass. 658, 511 N.E.2d 562 (1987).

Federal Proceedings

In May 1984, the Corps, the Fish and Wildlife Service and the EPA held a meeting with Pyramid wherein Pyramid's proposal was discussed and compared to that of its predecessor, the DeBartolo Corporation. Pyramid requested that the project be authorized under a Corps "nationwide permit," a general permit requiring no application or public review. At that time, the EPA informed Pyramid of the rebuttable presumption that practicable, less environmentally damaging alternatives exist for non-water dependent projects located in wetlands. RD at 3. *See* 40 C.F.R. section 230.10(a). Thereafter, the Corps exercised its discretionary authority and required Pyramid to apply for an individual Section 404(a) permit.

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[11] The state regulations differ from the federal regulations in that they do not include the protection of wildlife habitat or the existence of practicable alternatives as considerations. *See* RD at 5.

In connection with its August 1984, Section 404(a) application, Pyramid submitted information concerning practicable alternative sites for its shopping mall.[12] A site three miles north in North Attleboro, Massachusetts was chiefly considered by the Corps and the EPA.[13] Pyramid relied on several factors in concluding that the North Attleboro site was not a practicable alternative; namely, the site lacked sufficient traffic volume and sufficient access from local roads, potential department store tenants had expressed strong doubts about the feasibility of the site and previous attempts to develop the site had met with strong resistance from the surrounding community.[14] In November 1984, after Pyramid had first presented its offsite mitigation proposal to convert a gravel pit into wetlands, the EPA recommended that the Corps deny the permit because of Pyramid's perceived failure to overcome the presumption that a less environmentally damaging practicable alternative existed. In January 1985 the Corps retained a consultant to examine the practicability of a mall at the North Attleboro site and the Corps and the EPA conducted an on-site investigation of the North Attleboro property. RD at 5. As a result, the Corps advised Pyramid that refusal of its permit was imminent. *Id.* In April 1985, Pyramid presented its plan for the creation of 36 acres of new wetlands in an effort to mitigate the loss which would occur at Sweden's Swamp.[15]

On May 2, 1985, the Division Engineer of the New England Division of the Army Corps sent his recommen-

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[12] At this time, Pyramid had not yet proposed any off-site mitigation. B-2; B-4.

[13] RD at 4; B-2; B-173, "Feasibility Analysis" prepared for State Properties of New England (New England Development Co); B-226, "Letter dated December 10, 1984 from State Properties of New England to Corps, EPA and FWS."

[14] B-2 at 13-15; RD at 34-37.

[15] RD at 5. Pyramid eventually dropped the site from consideration.

dation on Pyramid's application to the Director of Civil Works, Major General Wall, at Corps Headquarters in Washington, D.C. This recommendation urged that the permit be denied because a practicable alternative with a less adverse effect on the aquatic ecosystem existed.[16] In his review of the application, Major General Wall concluded:

> In a proper case, **mitigation measures can be said to reduce adverse impacts** of a proposed activity to the point where there is no "easily identifiable difference in impact" between the proposed activity (including mitigation) versus the alternatives to that activity. In such a case, mitigation measures would have made a contribution to the satisfaction of 40 C.F.R. 230.10(a) [the practicable alternatives test].

B-13 at 5 (emphasis added); SOF/EA, Views of the Chief of Engineers at 5. Under this interpretation, proposed mitigation at one site would suffice to establish that no less damaging practicable alternative existed. However, Major General Wall also employed a traditional analysis of the practicable alternatives and found:

> [F]rom the point of view of the applicant in this case, it appears that the North Attleboro site is not available. The north site is controlled by a competitor who has an interest in developing a regional shopping mall in the same trade area as the applicant. Even if it were available to the applicant, he makes a convincing argument that it would not successfully fulfill the purposes of his proposed project, from his particular point of view.

B-13 at 1; SEOF/EA, Views of Chief of Engineers at 1.

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[16] RD at 6; B-11, "Corps Recommendation dated May 2, 1985"; B-12, "Corps Recommendation."

Although Sweden's Swamp is characterized in this report as a wetland of relatively low value and degraded by uncontrolled use and by dumping of solid waste, its function as a wildlife habitat is recognized. *Id.* at 2. Major General Wall directed the New England Division of the Corps to prepare a notice of intent to issue the permit and to reconcile its findings with the foregoing determination. *Id.*

Accordingly, the Corps concluded that no practicable alternative to the South Attleboro site existed because the North Attleboro site was not available to Pyramid and substantial doubt existed as to whether the site would fulfill Pyramid's purpose. Although the Corps determined that the proposed project would not have an adverse effect on water quality, flood control or drinking water supplies, it expressed concern that the proposed reduction in on-site wetland acreage "could cause substantial adverse impact on local stocks of those species associated with forested wetland cover type . . . (i.e., red-shouldered hawk, small birds, small mammals such as skunk, possum and raccoon, and certain reptiles and amphibians.") SOF/EA at 16. The Corps, therefore, conditioned the issuance of any permit specifying Sweden's swamp as a disposal site upon the Corps' approval of Pyramid's mitigation efforts. *Id.* at 36.

On June 28, 1985, the Division Engineer notified the regional offices of the EPA and the United States Fish and Wildlife Service (FWS) of the Corps' intent to issue a permit to Pyramid.

EPA's Decision

On July 23, 1985, the EPA's Regional Administrator notified the Corps and Pyramid that he intended to initiate Section 404(c) proceedings.[17] The EPA based this decision upon its belief that an unacceptable adverse effect to wild-

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[17] RD at 7; B-316.

life could result from filling Sweden's Swamp. On March 4, 1986, the Regional Administrator made a "Recommended Determination" to prohibit the specification of Sweden's Swamp as a disposal site for dredged or fill material. The Recommendation was based upon the finding that Pyramid's project was likely to have unacceptable adverse impacts on the wildlife habitat at Sweden's Swamp. On May 13, 1986, the EPA issued its Final Determination prohibiting the specification of Sweden's Swamp as a disposal site for fill material.

The Final Determination described Sweden's Swamp as a typical, well-established functioning red maple swamp which provides excellent wildlife habitat for a variety of birds, mammals, and amphibians, and provides flood storage capacity, groundwater discharge and water purification. FD at 30. It further found that the destruction of the wetlands proposed by Pyramid would adversely affect wildlife by driving away or killing animals currently living there. *See* FD at 10-12. The EPA declared:

> In determining whether these adverse impacts are unacceptable [within the meaning of section 404(c)], it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are practicable, less environmentally damaging alternatives to the proposed project.

FD at 13.

In the EPA's opinion, another less environmentally damaging site in the area, i.e., the North Attleboro site, was a feasible alternative which had been available at the time Pyramid initially selected a site for its project. FD at 16-26, 31. Thus, the EPA reasoned that any adverse effects resulting from Pyramid's project were avoidable and were therefore unacceptable within the meaning of Section 404(c). The Final Determination concluded that "based on the excellent wildlife value of the wetland . . . its site and setting, the avoidability of the loss, and the significance

of such areas in Massachusetts, . . . filling Sweden's Swamp to build the proposed mall would have unacceptable adverse effects within the meaning of section 404(c)." FD at 31.

DISCUSSION

I. Summary of Arguments

The plaintiffs contend that the EPA's decision to deny the permit is incorrect as a matter of law because (1) the EPA impermissibly relied on the "avoidability" of environmental impacts in determining their "unacceptability" under Section 404(c) and (2) the EPA impermissibly reconsidered the Section 404(b) availability question and backdated that inquiry.[18] Plaintiffs also argue that even if the EPA's statutory and regulatory interpretations are upheld as reasonable, the EPA's conclusion was arbitrary and capricious. The defendants, on the other hand, argue that Section 404(c) clearly allows the EPA to prohibit the filling of a wetland where that filling would have an unacceptable adverse impact on wildlife. The EPA contends that it was authorized to consider the Section 404(b)(1) guidelines in determining whether the environmental impacts were unacceptable and that its decision to assess the practicable alternatives available at the time of project planning was proper and consistent with the Act's and the regulations' goals.

2. Standard of Review

As noted, the court has before it now the parties' cross-motions for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c). The facts in this case

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[18] The plaintiffs also allege that the EPA impermissibly amended a regulation without the procedures mandated by the Administrative Procedure Act. The court rejects this contention.

are undisputed. In reviewing the EPA's decision, the court must engage in a two-fold inquiry and determine (1) whether the EPA's interpretation of Section 404 and its implementing regulations was reasonable and (2) whether the EPA's application of this interpretation to the facts was rational.

An agency's interpretation of the statute and regulations it is charged with administering is entitled to deference. *See EPA v. National Crushed Stone Ass'n.*, 449 U.S. 64, 83, 101 S.Ct. 295, 307, 101 S.Ct. 295, 307, 66 L.Ed.2d 268 (1980). This is also true when the agency participated in formulating a disputed regulation. *See United States v. Hescorp. Heavy Equip. Sales Corp.*, 801 F.2d 70, 76 (2d Cir.1986) (treasury regulation construed) (citing *Miller v. Youakim*, 440 U.S. 125, 144, 99 S.Ct. 957, 968, 59 L.Ed.2d 194 (1979)). Its interpretation need not be the only reasonable one, and the court must uphold a reasonable interpretation, even if the court would not have reached the same conclusion in the first instance. A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency when a "statute is silent or ambiguous with respect to the specific issue. [Then] the question for the court is whether the agency's answer is based upon a permissible construction of the statute." The court, must, however, reject administrative constructions which are contrary to clear congressional intent. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 121, 131, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90 (1985); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); *Biggs v. Lyng*, 823 F.2d 15, 18 (2d Cir.1987).

Because the Clean Water Act does not set forth the standards for review of the EPA's substantive decisions, the court must look to the standards articulated in the

Administrative Procedure Act for guidance. *See Avovelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897 (5th Cir.1983). The proper inquiry for the court is whether the EPA's Final Determination is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* Administrative Procedure Act section 10(e), 5 U.S.C. section 706(2)(A); *Buttrey v. United States,* 690 F.2d 1170, 1183-85 (5th Cir.1982), *cert. denied,* 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983). In undertaking this task, the court must remain mindful of the carefully circumscribed nature of its function. In *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co.,* 463 U.S. 29, 42-43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983), the Supreme Court delineated the boundaries of the court's review in applying the arbitrary and capricious standard.

> [A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute . . . The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 [83 S.Ct. 239, 246, 9 L.Ed.2d 207] (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285; [95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974)]; *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 [91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971)]. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors

> which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to agency expertise.

Accord Sierra Club v. United States Army Corps of Engineers, 772 F.2d 1043, 1051 (2d Cir.1985); *Avovelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 904 (5th Cir.1983); *Great Salt Lake Minerals and Chems. v. Marsh,* 596 F.Supp. 548, 553 (D.Utah 1984). In reviewing the EPA's determination of the facts in the case at bar, the court is limited to a review of the administrative record. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973); *accord Buttrey v. United States,* 690 F.2d 1170, 1184 (5th Cir.1982) (reviewing decision of Corps under Section 404(b) Guidelines). Keeping these principles in mind, the court now turns to an examination of the issues at hand.

3. Use of Section 404(b)(1) Guidelines in Section 404(c) Review

Pyramid contends that the avoidability of potential adverse environmental impacts of a proposed disposal of fill material may not be considered in evaluating the **unacceptability** of those impacts and challenges the EPA's use of this criterion. Pyramid would have this court adopt a narrow construction of Sections 404(b) and (c) and the regulations promulgated thereunder. Pyramid contends that the EPA may *not* consider nonenvironmental findings already made by the Corps at the permitting stage in determining whether a proposal will have unacceptable adverse environmental results within the meaning of Section 404(c) and 40 C.F.R. section 231.2(e). The EPA, on the other hand, argues that the use of the "practicable alternatives" test set forth in the Section 404(b)(1) guidelines governing the Corps' decision are equally applicable

to an EPA decision under Section 404(c). Moreover, the EPA asserts that independent consideration of the "practicable alternatives" test was proper.

Statutory Language

Section 404(c) allows the EPA to forbid specification of a particular disposal site when it determines that a proposed discharge "will have an unacceptable adverse effect." 33 U.S.C. section 1344(c). The statute itself restricts the EPA in only two ways. First, the EPA must provide for notice and a public hearing, which it undeniably did in the case at bar, and second, the EPA must evaluate unacceptable adverse effects in terms of municipal water supplies, shellfish beds and fishery areas, wildlife or recreation areas. 33 U.S.C. section 1344(c). The 404(c) regulations reiterate this latter limitation and define an "unacceptable adverse effect" as an "impact on an aquatic or wetland ecosystem which is likely to result in significant loss of or damage to" any of the environmental interests enumerated in Section 404(c), including wildlife areas.

Pyramid contends that neither the statute itself nor the implementing regulations authorize the EPA to take into account the existence of a "practicable alternative" when making a determination that a proposed project will have an unacceptable adverse impact and result in significant degradation to one of the enumerated environmental interests. Section 404(c) does not define the term "unacceptable adverse effects" or specify the factors relevant to an "unacceptability" determination. On the other hand, nothing in the statute prohibits the use of the 404(b)(1) guidelines in making that determination. In addition, the Section 404(c) regulations note that the EPA should consider the "relevant portion of the [404(b)] guidelines" in making a Section 404(c) unacceptability determination. 40 C.F.R. section 231.2(e).

These guidelines are based in part on the Section 403(c) criteria regulating ocean discharges. Section 403(c) iden-

tifies a broad range of factors to be considered by the Administrator in promulgating guidelines under Section 403(c).[19] Section 403(c)(1)(F) includes the availability of other "possible locations and methods of disposal" as a factor. The 404(b)(1) guidelines likewise mandate consideration of the availability of other possible locations in order to minimize unnecessary destruction of aquatic resources. Under Pyramid's analysis, however, the only relevant portions of the 404(b)(1) guidelines are those which directly pertain to the five resources listed in Section 404(c).

The court rejects Pyramid's contention that the fact that Section 403(c) and Section 404(b) are concerned with a greater number of environmental factors than is Section 404(c) limits the **manner** in which the EPA may determine the effect on the 404(c) resources, including the use of the practicable alternatives test. Both the 404(b)(1) guidelines and the section 403 criteria, upon which they are patterned, provide a means to evaluate the desirability of discharges into the aquatic environment. Applying these

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[19] Section 403(c) states, in part:

(c)(1) The Administrator shall . . . promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) The effect of disposal of pollutants on human life . . .;
(B) the effect of disposal of pollutants on marine life. . . .;
(C) the effect of disposal of pollutants on aesthetic, recreation and economic values;
(D) the persistence and permanence of the effects of the disposal of pollutants;
(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;
(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and
(G) the effect on alternate uses of oceans, such as mineral exploitation and scientific study.

33 U.S.C. section 1343(c)(1)(A)-(G).

standards to a proposed discharge in a particular context does no violence to the policy underlying the Act. These guidelines provide a useful tool for evaluating discharges into the aquatic environment. Furthermore, the fact that Section 403(c) explicitly allows an agency to consider a certain factor does not necessarily mean that the absence of such a provision in Section 404(c) precludes consideration of that factor. Instead, use of these criteria makes the general standard workable. Moreover, the EPA did not use the Section 404(b)(1) guidelines to find an unacceptable adverse impact on any resource not specified in Section 404(c). The unacceptability of the site was determined with respect to wildlife, a category explicitly enumerated thereunder.[20]

Alternatively, Pyramid argues that the EPA's interpretation is in contravention to the clear language of the regulations. An unacceptable adverse effect is defined as an "impact on the aquatic or wetland ecosystem which is likely to result in significant loss of or damage to" any of the environmental resources enumerated in Section 404(c). 40 C.F.R. section 231.2(e). Arguably, the only relevant portion of the 404(b)(1) guidelines are those pertaining to the degree or magnitude of an effect[21], and only those findings relevant to determining whether a significant degradation has occurred under Section 404(b) are relevant to the EPA's inquiry under Section 404(c).[22] The

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[20] This aspect of the Final Determination will be discussed at a later point in this opinion.

[21] The term "significant" as used in the 404(b)(1) guidelines means "important, major or consequential." *Sierra Club v. United States Army Corps of Engineers*, 772 F.2d 1043, 1053 (2d Cir.1985).

[22] 40 C.F.R. section 230.10(c) provides, in part:
[N]o discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon the appropriate factual determi-

404(b) regulations state that findings of significant degradation shall be based upon appropriate factual determinations, evaluations and tests required by subparts B and G, after consideration of subparts C-F of 40 C.F.R. section 230. Although Subpart B prohibits discharges when a practicable alternative exists, Pyramid focuses exclusively on that portion of Subpart B which prohibits significant degradation to waters and claims that it alone is relevant to a Section 404(c) analysis.

The court finds, however, that the pertinent regulations, when read as a whole, do not mandate this restrictive interpretation. Indeed, the regulations expressly state that "degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. section 230.1(d). The 404(b)(1) guidelines address not only the magnitude of the loss but also the avoidability of the loss.

The court finds the EPA's interpretation that the avoidability of a loss may be considered in conjunction with its magnitude in determining whether it is "unacceptable" within the meaning of Section 404(c) and "significant" within the meaning of the implementing regulation is reasonable. This interpretation does not violate the plain language of the statute or the language of the pertinent regulations.

Pyramid also objects to the EPA's "de novo" review of the Corps determination that no practicable alternatives were available. Neither the statute nor the pertinent reg-

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nations, evaluations, and tests required by Subparts B and G, after consideration of Subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively include:

(3) Significant adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat . . .

ulations mandate that the EPA accept all or part of the Corps' findings under Section 404(b) in making its determination under Section 404(c). The plaintiffs contend that this freedom will allow the EPA unbridled authority to second guess every application by the Corps of the 404(b)(1) guidelines[23] and will effectively vitiate the scheme of review envisioned by Congress.

Although the statute itself does not prohibit the Administrator from exercising his independent judgment in applying portions of the 404(b)(1) guidelines in deciding whether an adverse effects are unacceptable under Section 404(c),[24] the court must examine the legislative history. An administrative interpretation which appears reasonable under the language of the statute but is contrary to the intent of Congress cannot be upheld. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 101 S.Ct. 2239, 68 L.Ed.2d 744 (1981) (statutory language controls unless clear legislative intent to contrary).

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[23] Pyramid claims that adoption of the defendants' view will result in gross duplication of administrative effort. The court however, questions the accuracy of this prophecy. The EPA has completed only five Section 404(c) proceedings as compared to the thousands of permit decisions made by the Corps since the enactment of the Federal Water Pollution Control Act in 1972.

[24] Indeed, Judge Green, in *Newport Galleria Group v. Deland*, 618 F.Supp. 1179, 1182 n. 2 and 1184 (D.D.C.1985), noted *albeit* in dicta, that "it would be extraordinary if Congress granted the EPA veto power over the Corps' permit decision, but precluded it from reconsidering those issues the Corps considered in granting the permit in the first place . . . if the section 404(c) veto is to have any meaning at all, the EPA must be able to disagree with the Corps' conclusions." In *Newport Galleria Group*, the plaintiffs herein sought to enjoin the EPA Regional Administrator from commencing Section 404(c) proceedings. They asserted therein that the EPA had no authority to reconsider the practicable alternatives already considered by the Corps. The court dismissed the action on the basis that final reviewable agency action had not occurred.

Legislative History

Pyramid claims that the legislative history demonstrates Congress' intent to vest the Corps with broad authority to consider "reasonable alternatives" as part of the permitting process and to restrict the EPA's reviewing authority to areas of environmental concern. Plaintiffs rely on language contained in the House bill and report in making this assertion.

The House bill gave the Corps responsibility for regulating the discharge of dredged or fill materials but recognized the EPA's expertise in environmental areas. *See* H.R. 11896, 92d Cong., 2d Sess. (1971), *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 1063 (1973). Thus the EPA was given authority, but this authority was restricted to prohibiting the discharge of dredged or fill materials "in critical areas" such as "shellfish beds, breeding or spawning areas, highly susceptible resort beaches, and similar areas." H.R. Rep. No. 911, 92d Cong., 2d Sess. 129 (1972), *reprinted in* 1 *Leg. History* at 816. Moreover, the Corps was not required to follow the EPA's designation of critical areas when the Corps certified that there was no "feasible alternative reasonably available." H.R. 11896, *reprinted in 1 Leg. History* at 816.

The original Senate bill, however, made no distinction between disposal of dredged or fill material and any other pollutant. S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* 2 *Leg. History* at 1685-92 (1972). Consequently, the Senate, recognizing and deferring to the agency's expertise in environmental areas, proposed that permitting authority lie with the EPA. Senate Debate on S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in Leg. History* at 1387-88. Amendments giving the Corps exclusive authority to regulate the discharge of dredged or fill material were rejected. S.Rep. No. 414, 92d Cong., 1st Sess. 92 (1971),

U.S.Code Cong. & Admin.News 1972, p. 3668, *reprinted in* 2 *Leg. History* at 11059.

The version finally adopted represented a compromise between both houses whereby the Corps retained its traditional permitting authority and the EPA exercised its expertise in evaluating impacts on environmental resources. *See* S.Rep. No. 92-1236, 92 Cong., 2d Sess., *reprinted in* 1 *Legislative History* at 324-35. Senator Muskie described this compromise as follows:

> A major difference between the Senate Bill and the House amendment related to the issue of dredging. The Senate Committee had reported a bill which treated the disposal of dredged spoil like any other pollutant. Pursuant to an amendment accepted on the Senate floor, dredged spoil disposal was made subject to a different set of criteria to determine any environmental effects.
>
> The House bill not only established a different set of criteria to determine the environmental effects of dredged spoil disposal but also designated the Secretary of the Army rather than the Administrator of the Environmental Protection Agency as the permit issuing authority. The Conference agreement follows those aspects of the House bill which related to the Secretary of the Army's regulatory authority. However, consistent with the Senate provision, the Administrator of the [EPA] has three clear responsibilities and duties.
>
> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate section 301(a).
>
> Second, **the [EPA] must determine whether or a not a site to be used for the disposal of dredge spoil**

> **is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.**
>
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of **will not adversely affect the municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas)**, wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

1 *Leg. History* at 177 (emphasis added). Pyramid characterizes the compromise reached as reflecting Congress' desire to give each agency a discrete role.

However, nothing in the legislative history indicates Congress' desire to limit the EPA's role in assessing the environmental acceptability of a site. Indeed, statutory language should be interpreted in a way that harmonizes it with the general purposes manifested by Congress. *See C.I.R. v. Engle*, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984). None of history cited demonstrates that the Administrator may not consider the practicable alternatives test originally employed by the Corps in determining the environmental impact of a proposed discharge on the five identified resources.

4. Practicable Alternative Finding

Feasibility

In order to be a practicable alternative, the alternative must be feasible. Pyramid argues that the EPA's determination of feasibility was based upon its erroneous conclusion that the marketplace considered the North Attleboro site suitable for a virtually identical regional shopping mall. FD at 16. Pyramid notes that six other shopping center developers over the past fifteen years have

tried and failed to develop the North Attleboro site as a shopping center. B-6 at 4-12. It contends that the EPA impermissibly substituted its own judgment for that of the marketplace in an area in which it cannot claim expertise. *See Friends of the Earth v. Hintz,* 800 F.2d 822, 835 (9th Cir.1986).[25] Pyramid would, therefore, require the EPA to adhere to the details of an applicant's plan.

The EPA, however, contends that it did not simply substitute its judgment for that of the developer. Indeed, "an applicant's submission of information clearly within its expertise is normally accepted by the Agency." FD at 17. Instead, the EPA argues that the evidence on the record demonstrates that the North Attleboro site is suitable in fact for a regional shopping mall virtually identical to that proposed by Pyramid.[26] In this respect, the fact that a competing developer the New England Development Company, Inc. had found the site suitable for a similar shopping mall, *See* B-235; B-173, and its own marketing analysis weighed in reaching this decision. FD at 17; B-863. The EPA also engaged in a review of the specific features that Pyramid found objectionable; namely, the distance from the primary trade area[27], lack of visibility from near-by highways[28], zoning[29], past failures of prior attempts to develop a shopping mall at the site[30], and various practical

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[25] The court held that the Corps' reliance on a 404 applicant's submissions on feasibility was proper and stated that "the Corps is not a business consulting firm, it is in no position to conduct a feasibility study of alternative sites."

[26] FD at 16. B-173, "Feasibility Analysis for State properties of New England"; B-235, "Mall Market Analysis for Corps."

[27] FD at 17-18.

[28] The EPA determined that the site was visible from I-295 and Route 1. FDA at 18.

[29] The EPA determined that the zoning had been changed to accommodate a shopping mall. FD at 18.

[30] The EPA determined that the North Attleboro site was competing

considerations.[31] Consequently, the court finds that the EPA's feasibility determination was not arbitrary.

Availability

The EPA contends that its interpretation of "availability" was reasonable and its finding that at least one practicable alternative existed was not arbitrary and capricious. An alternative is practicable if it "**is available**" and "**capable of being done after taking into consideration cost, existing technology and logistics in light of overall plan purposes.**" 40 C.F.R. 230.-10(a). For the purposes of this section, "**an area not presently owned by the applicant which could be reasonable obtained . . . may be considered.**" *Id.* The plaintiffs argue that "available" means "presently available." Under this interpretation, the permitting authority would be required to limit its consideration of the alternative sites to those sites which are available to the applicant *at the time the agency makes its decision on the permit application.* Thus, Pyramid claims that the EPA engaged in impermissible "back-dating" when it decided that the availability determination should be made at the time the applicant "entered the market", FD at 21 n. 14, "began its investigation," *Id.* at 22 or "comprehensively evaluated the area." *Id.* at 22 n. 15. Pyramid argues that this interpretation gives the EPA unlimited power to block proposals merely because some alternative was available in the past.

The EPA counters this argument by noting that Pyramid's interpretation of the regulations undercuts the purpose underlying the practicable alternatives test and that

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for some the same tenants that Pyramid had considered. Furthermore, the New England Development Company had not encountered any major obstacles in its efforts to develop the North attleboro site. FD at 19; *see* H-81.

[31] The EPA determined that these same practical considerations afflicted the Sweden's Swamp site. FD at 19.

it is reasonable and consistent to expect applicants planning non-water dependent projects to demonstrate that construction on uplands was considered before the use of wetlands was contemplated. Plaintiffs, however, argue that the regulations do not impose any pre-application obligation on the applicant to investigate the use of uplands, rather, they maintain that the burden is on the Corps to determine whether an alternative "is available."

Pyramid also bases its conclusion on the language of the regulation itself which states that "an alternative is practicable if it is available." The EPA contends that the term "is available" can refer to any time period in which the guidelines are applied. The Final Determination focused on the point in time when the applicant actually examined the alternatives. This interpretation guards against manipulation by developers.

Nevertheless, Pyramid argues that the EPA's interpretation of availability is entitled to no deference whatsoever because determinations of feasibility and availability are not matters within the agency's expertise. *See Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303 (7th Cir.1983). Pyramid would have the court adopt the Corps' interpretation of the term "available." Although the Corps did not specifically address this issue, it did determine that:

> [F]rom the point of view of the applicant in this case, it appears that the North Attleboro site is not available. The north site is controlled by a competitor who has an interest in developing a regional shopping mall in the same trade area as the applicant.

B-14 at 1; SOF/EA, Views of the Chief of the Engineers at 1.

Moreover, the Corps' Statement of Findings and Environmental Assessment states:

> Is there an alternative . . . not presently owned by the applicant, that can be reasonably obtained? *There*

> *is an alternative site available . . . It is not available to these applicants, because it has been optioned by another mall developer.*

Id. at 16.

Thus, it appears that the Corps assumed that the alternatives were to be considered contemporaneously with the application.

Nevertheless, the court finds that the EPA's interpretation of the regulations was reasonable.

Assuming that the government's "market entry" approach to availability is reasonable, Pyramid claims that the record does not support the agency's finding of availability.

Support in Record

The record shows that the New England Development Company optioned the North Attleboro site on July 1, 1983. *See* FD at 22.[32] Pyramid did not purchase Sweden's Swamp until December 1983 and was not in the area until September of 1983. *See* Plaintiff's Reply Brief at 22. Thus, Pyramid concludes that the EPA could not reasonably infer from the record that it had "entered the market" prior to New England's gaining control of the property.

The EPA, however, asserts that its decision was based on evidence in the record. Although the largest parcel was under its control in July 1983, the site option acquisition was not completed until February 1984, after Pyramid acquired Sweden's Swamp in December 1983. *Id.* Pyramid has stated that it had the opportunity to purchase the North Attleboro property but declined to do so, B-888 (statement by Bersani in newspaper); B-107 (minutes of 4/3/85 meeting with Pyramid). Statements to this effect were

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[32] *See* B-109 (EPA memo); B-474; B-863; B-226; B-455A; H-76.

contradicted, however, at a later time. B-42 at 9 (Bersani Affidavit) (site not available); B-504 at 4 (site not available after fall of 1983). In its supplement to its Section 404 application, dated October 1984, Pyramid states that "our ultimate [reason] for rejecting the North Attleboro I site was its location and therefore its market nonfeasibility." B-6 at 20. The supplemental application does not indicate whether the New England Development Co. would have sold the land to Pyramid in September of 1983, but Pyramid does state in that document, however, that "our competitor, State Properties of New England [New England Development Co], has spent little, if any, money on their attempt to develop this site. The current landowner, Allen Riley, is the primary financier of this effort. Mr. Riley is driven by a need and desire to rid himself of a vacant parcel with which he has been burdened for over five years." B-6 at 21.

Finally, the EPA simply did not believe Pyramid's assertion that it purchased the site in December 1983 after only eight weeks of investigation. FD at 22; *see* B-42 at 10. The EPA reached the conclusion that it would be customary to investigate a trade area for longer than eight weeks. FD at 22, n. 15. For example, Pyramid's predecessor, the Edward DeBartolo Corporation withdrew its plans to develop the area in March 1983. DeBartolo then contacted Pyramid. B-131. Pyramid, however, is correct in its assertion that the EPA has failed to cite any direct evidence pertaining to its conclusion that industry custom would support a finding that more than eight weeks are necessary to properly evaluate an area.

Nevertheless, the court finds that the record supports the EPA's finding that the North Attleboro site was available to Pyramid at the time it "entered the market" in September or December of 1983. This conclusion was not arbitrary.

Even assuming that the EPA reached an arbitrary decision regarding the availability of a practicable alternative, its Final Determination must be upheld as reasonable because it was based upon a rational, independent finding that a significant loss in wildlife resources would result from the construction of a mall at Sweden's Swamp.

5. Adverse Effects

Pyramid contends that the EPA failed to find that unacceptable adverse effects would flow from construction of the proposed mall, but instead based its conclusion solely on the fact that a practicable alternative existed. It claims that any findings of adverse effects are inextricably intertwined with the EPA's finding that these effects were avoidable. Pyramid concedes that proposed mitigation is relevant to determining the *net* environmental effect. *See* Plaintiffs' Reply Brief at 34 n. 29.

The Final Determination issued by the EPA clearly identifies the adverse effects of the project on the site's wildlife resources.[33] The decision makes the following findings.

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[33] The intervenor-plaintiffs Citizens in Support of Attleboro Mall and Joseph Robichaud (CISA) contend that the EPA committed error by considering the effects of the proposed discharge on the "wildlife habitat" rather than on the "wildlife" because Section 404(c) refers to "wildlife." They also argue that a finding of adverse effects on wildlife or wildlife habitat must involve a specific adverse effect on water quality.

Assuming the legal correctness of the intervenor-plaintiffs' position, the administrative record does indicate that destruction of the existing wildlife habitat at Sweden's Swamp will adversely effect wildlife by driving away or killing animals currently living there; by reducing the buffer zone protecting wildlife from human-induced disturbances and by affecting the types of species which would use the area, particularly predatory birds. FD at 10-12; RD at 19-22; SOF/EA at 11-12.

Furthermore, Section 404 addresses broader concerns than traditional notions of water quality. Section 404(c) itself refers to wildlife and recreation, thus, reflecting a broad congressional concern. There

Sweden's Swamp provides an "excellent" habitat for migratory bird species and a variety of mammals and amphibians. FD at 7. Construction of mall at the swamp would eliminate or alter a substantial part of this habitat and result in a significant loss of existing wildlife habitat. FD at 7-9. Nesting species would be adversely affected and many mammals would retreat from or be killed during the construction. FD at 9-10. Many of the displaced species would perish. "The displacement would particularly adversely affect nesting species, such as the northern flicker, gray catbird, song sparrow and white-breasted nuthatch, and species which prefer forested wetlands, such as the red-shouldered hawk and the Kentucky warbler." FD at 10.

Moreover, the Final Determination dwelt extensively on the uncertainty surrounding the potential success of Pyramid's mitigation proposals. The Administrator determined that the proposed onsite mitigation, which contemplated the creation of emergent marsh, shrub swamp and open water from existing wooded wetlands, would have minimal value after the excavation and regrading. Furthermore, the degree of resettlement would be affected by the activity at the mall and these new wetlands would not buffer the wildlife from the disturbance of nearby highways as effectively as the existing wooded wetlands. The new wetlands would be substantially smaller and of a different type than those lost. FD at 10. The potential success of the offsite mitigation attempt was deemed uncertain. In this respect, Pyramid proposed that it create 36 acres of emergent wetlands, shrub swamp and open water at a location two miles from Sweden's Swamp. Even if successful, the net increase in habitat values at the offsite location would not compensate for those lost at the proposed shopping

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is absolutely no language in the statute or the implementing regulations which supports intervenor-plaintiffs' interpretation that a nexus between an effect on water quality and the adverse effects on wildlife or the wildlife habitat be demonstrated.

mall site. Additionally, the proposed offsite and onsite wetlands would, if successful, provide habitat for a different species mix than that currently populating Sweden's Swamp.

Although the EPA went on to state that "in determining whether these adverse impacts are unacceptable, it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are practicable, less environmentally damaging alternatives to the proposed project," it clearly did consider whether the proposed project would result in "**significant loss of or damage to . . . wildlife habitat.**" 40 C.F.R. 231.2(e). The regulations define an impact having this type of adverse effect as "unacceptable." Applying the definition urged by Pyramid, an effect is significant if it is "important, major or consequential." The Final Determination suggests that these losses are "substantial." At one point, the filling of the swamp is characterized as a "significant avoidable loss of wildlife habitat." Although the decision bases its finding of unacceptability, in part, on avoidability, it also considers the cumulative impact of similar losses and the nature of the loss in this particular context in reaching its decision. Thus, the EPA finally concluded that "the excellent value of the wildlife value of the wetland in question, its size and setting, the avoidability of the loss and the significance of such areas in Massachusetts" made the effects of the project "unacceptable." FD at 30.

Even assuming that the EPA arbitrarily considered and determined the practicable alternatives question, which it did not, the court finds that another independent and rational basis for its decision existed.

CONCLUSION

For the reasons cited above, the court hereby grants the defendants' motion for summary judgment and denies the plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

APPENDIX C

FINAL DETERMINATION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS CONCERNING THE SWEEDENS SWAMP SITE IN ATTLEBORO, MASSACHUSETTS PURSUANT TO SECTION 404(c) OF THE CLEAN WATER ACT

I. INTRODUCTION

Section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) regulates the discharge of dredged or fill material to waters of the United States. Waters of the United States are defined to the broadest extent possible under the Commerce Clause of the Constitution, and include most wetlands. Such discharges are allowed only to the extent authorized by a section 404 permit and not prohibited or restricted by EPA pursuant to section 404(c). Congress established this regulatory scheme in recognition of scientific evidence which indicates that discharges of dredged and fill material can result in the destruction or degradation of aquatic areas with important public values. Wetlands play an essential role in the hydrologic cycle, purify water by holding nutrients and recycling pollutants, shield upland areas from storm damage, and provide vital food resources and habitat for fish and wildlife.

The 404 permit program recognizes both developmental and environmental values by focusing on protecting the resource (that is, the biological, physical, and chemical integrity of the Nation's waters) rather than on regulating development per se. The public has a legitimate expectation in the reasonable protection of private property rights, including the right to make reasonable, beneficial use of one's property. Citizens also expect, however, that the protection of property rights will be consistent with the

need to protect resources that are beneficial to all. This nation would be ill-served by a policy which does not take account of the legitimacy of interests in both environmental protection and economic development. The statutory structure created by Congress in section 404 attempts to accommodate both sets of interests.

The section 404 permit program seeks to minimize adverse effects of discharges of dredged or fill material through application of the section 404(b)(1) Guidelines (regulations developed by the Environmental Protection Agency in conjunction with the Army Corps of Engineers). The Guidelines prohibit discharges which cause "significant degradation" to the aquatic ecosystem or for which there are practicable, less damaging alternatives, and require adoption of practicable measures to minimize adverse effects of the discharges that are allowed. Although permits are issued by the Army (acting through the Corps of engineers) or by approved states, the Act also provides EPA an opportunity under section 404(c) to exercise the final judgment on whether a particular discharge will have unacceptable adverse affects on aquatic resources. Before making such a section 404(c) determination, the Administrator must consult with the Chief of Engineers, the landowner, and the applicant in cases where there has been an application for a section 404 permit.

The Administrator has delegated this authority to make a final determination under section 404(c) to the Assistant Administrator for External Affairs, who is EPA's national section 404 program manager.

In this case, Pyramid Companies (Pyramid) has proposed to fill 32 acres of forested wetlands and to alter an additional 13 acres of forested wetlands at a site called Sweedens Swamp in Massachusetts. The purpose of this proposed discharge of dredged and fill material is to construct a shopping mall and appurtenant facilities. Pyramid has also offered to create 36 acres of artificial marsh wet-

lands to compensate for the loss of Sweedens Swamp, and has offered to post a $1 million performance bond on the man-made wetland's construction.

The Corps of Engineers gave great weight to Pyramid's offer and concluded that the project should be allowed to proceed, notwithstanding questions concerning the availability of upland alternatives. The Corps concluded that Pyramid's proposed wetland creation (or "mitigation") would yield an equivalent or better environmental result than preserving the existing wetland. Because of the site specific and generic implications of wetland creation and its relationship to EPA's and Corps' longstanding policy of avoiding the destruction of existing wetlands when the applicant has other practical alternatives available, EPA initiated this section 404(c) proceeding.

After full consideration of the record in this case and after consultation with the Corps, Pyramid and other interested parties, I have determined that the discharge of dredged and fill material for the purpose of constructing a shopping mall at the Sweedens Swamp site should not be allowed. My findings and reasons for this determination are, in summary form, as follows:

Although mitigation is a valuable and important tool in wetland preservation and enhancement, it is still an uncertain science at best. EPA encourages mitigation efforts when there are no practical alternatives other than filling in a wetland for a particular project and the project does not cause significant degradation to aquatic resources. EPA is also attempting to improve the science of artificial wetland creation. Nonetheless, the science of wetland creation, particularly for a project of the size and type proposed here, is not sufficiently advanced to land the requisite certainty to a determination that existing benefits can be sacrificed on the promise that a new and different wetland will be "better" or even "equal" in value.

In reaching my decision, I have carefully considered the nature of the wetland at issue here. The comments in the record range from characterizing Sweedens Swamp as a "dump" to calling it a wetland "oasis." The truth is the Swamp is neither dysfunctional and useless, nor is it a pristine wetland of supreme individual value. It is, in the non-perjorative sense, an ordinary swamp. The fact that it is ordinary should not lead us to alter our policy policy of looking first to see whether there are practical alternatives to the destruction of the wetlands. I believe that, because of its confidence in the mitigation proposal, the Corps did not engage in its usual careful consideration of alternatives.

I find that there was a feasible alternative site available to Pyramid to fulfill its project objectives. And it is unacceptable to trade the certain benefits provided by this functioning wetland for the uncertain benefits of a large scale wetland creation. The language, regulations and purpose of section 404 all point to a fundamental principle: The degradation or destruction of special aquatic sites, such as wetlands, should be avoided if there are practical alternatives. This is neither a new nor a startling principle; it reflects a common sense approach to the preservation of a dwindling and important national resource.

What is unusual in this case is the factual setting in which the application of the principle arises. Pyramid now cannot realistically obtain the alternative site that I find was available to it. The site (North Attleborough) is owned by a competitor. Pyramid argues that the present unavailability of the site is dispositive and that it should be allowed to proceed with its project. I do not believe that fact can be given determinative weight.

When Pyramid entered the market area, it decided not to investigate the availability of the North Attleborough site, concluding that the site was not feasible for its project. That may well have been a reasonable business judg-

ment for Pyramid to make. But in relying upon that judgment and in failing to pursue the alternative, Pyramid took the concomitant risk that the marketplace would prove it wrong in its assessment of the feasibility of the site. That is what happened in this case. A competitor, entering the market contemporaneously with Pyramid, has taken the requisite steps to develop a similar project on the North Attleborough site. I cannot ignore that fact, nor can I, consistent with the purposes of section 404, lift from Pyramid the risk that it assumed in relying upon its business judgment that the North Attleborough site was infeasible. Pyramid's mitigation plan simply does not justify a deviation from the principle that wetlands should not be destroyed if practical alternatives are available.

In reaching my decision, I have also viewed this project in the context of broader regional issues. There has been a significant cumulative loss of wetlands in Massachusetts, and the state has put into effect stringent new limitations on wetlands destruction, effectively prohibiting any fill of more than 5,000 square feet of bordering inland wetlands. While this should not be viewed as a dominant factor—particularly since Massachusetts, by grandfathering the Pyramid project, has given the project the necessary state permits—it does reflect a qualitative assessment of the importance of the remaining wetlands in the state, and is a useful guidepost in judging the unacceptability of this fill.

Finally, on a more general note, I believe that both environmental and developmental interests are best served by a section 404 process that works efficiently and predictably. Great improvements in this regard have been made in the permit process. This particular section 404(c) proceeding has attracted a great deal of controversy and attention and has taken time to resolve. I do not view that, however, in any way as a flaw in the process. Pyramid made a novel offer of large scale offsite wetland creation in an effort to secure a permit for a site that it

bought with full knowledge of the environmental problems associated with its development. That offer raised admittedly difficult issues where assessments of risks and benefits may legitimately differ. As indicated by the decision here, EPA will tend to be more conservative in its assessment of scientific uncertainties. In leaving the final determination of "unacceptability" to EPA, however, Congress, contemplated that EPA would apply its expertise on issues such as mitigation and would take a conservative approach to our nation's unique aquatic sites. I have carefully weighed all aspects of the proposed permit and considered both its site specific and precedential implications. I am convinced that approval of the project, given the existing uncertainties and alternatives, would have unacceptable adverse environmental consequences.

II. PROJECT DESCRIPTION AND HISTORY

Pyramid proposes to fill 32 acres of wetlands in Sweedens Swamp in Attleboro, Massachusetts to build a regional shopping mall. (See Figures I-II.) If permitted, this would be the largest authorized wetlands fill project in Massachusetts in over five years. Pyramid proposes to mitigate the adverse impacts on water quality and wetlands by excavating thirteen additional acres of wetlands and nine acres of uplands onsite to create artificial wetlands. The alteration of the thirteen additional acres of natural wetlands is required to provide onsite capability for the storage and treatment of stormwater runoff from the development. Creation of thirty six additional acres of wetlands offsite would also be attempted.

Pyramid first formally presented its proposal, which at the time included only onsite mitigation, to the federal agencies in May of 1984. EPA and the U.S. Fish and Wildlife Service (FWS) expressed concern over the loss of

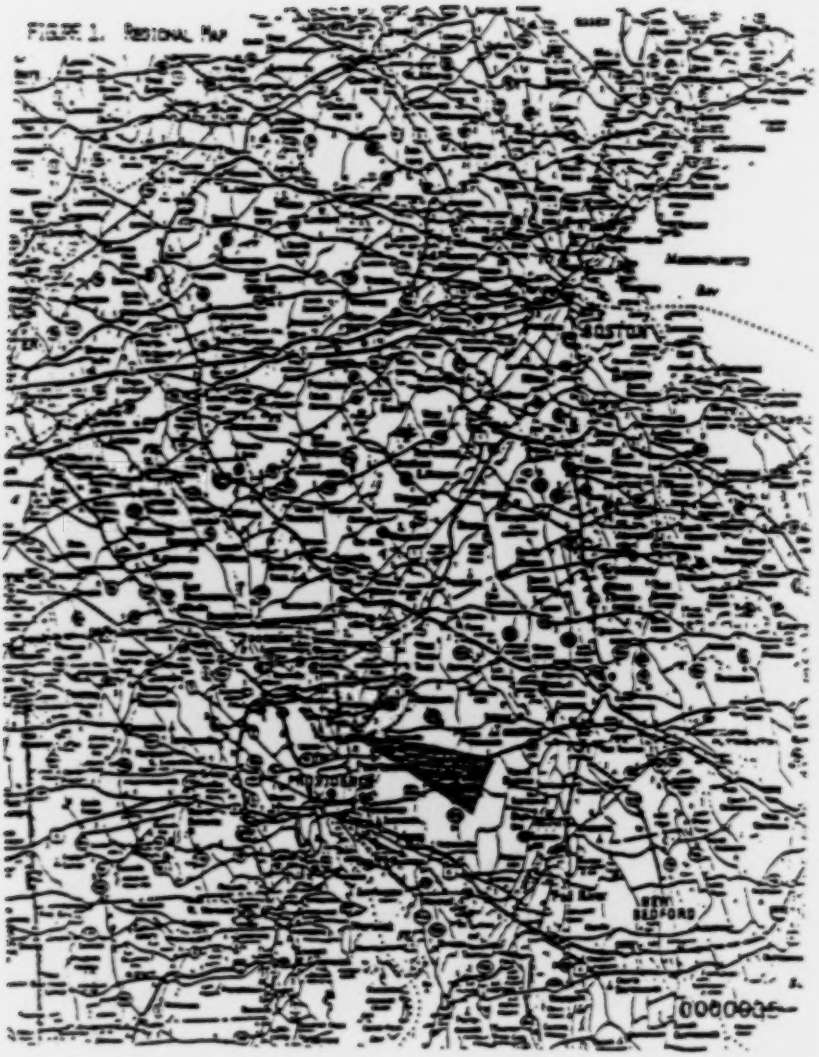
FIGURE 1. REGIONAL MAP
BOSTON
NEW BEDFORD

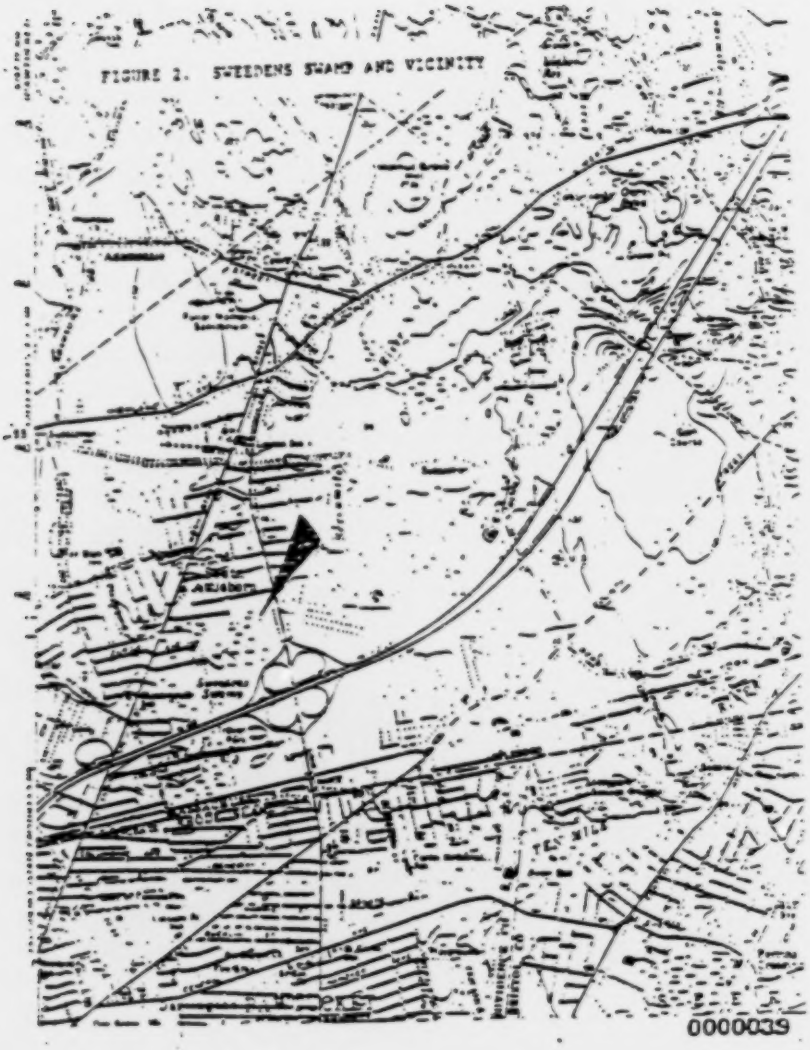
FIGURE 2. SWEDENS SWAMP AND VICINITY
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wetlands[1] and requested that the Corps of Engineers (Corps) exercise its discretion to require an individual permit. The Corps agreed and so notified Pyramid; the permit application was submitted in August of 1984. After participating with Pyramid, the Corps and FWS in an evaluation of the wildlife habitat value of the site, EPA wrote letters to the Corps again expressing concern over the impacts of the proposal, emphasizing the presumption in the section 404(b)(1) Guidelines that practicable alternatives are presumed to exist for non-water dependent activities (such as shopping malls) in special aquatic sites (e.g., wetlands). The Corps hired a consultant to examine the question of practicable alternatives; his January, 1985 report concluded that both Sweedens Swamp and a site in North Attleborough were feasible for development of regional shopping malls. New England Development, a competing developer, proposes to build a shopping mall at the North Attleborough site.

In April of 1985 Pyramid added a proposal for offsite mitigation to the project. The Corp's Division Engineer in May of 1985 prepared a recommendation that the permit be denied, concluding that Sweedens Swamp provides excellent wildlife habitat for species of local importance. Corps Headquarters in Washington, D.C., after reviewing the Divison's recommendation, determined that mitigation could make the applicant's proposal the alternative with the least adverse effect on the aquatic environment and directed the Division Engineer to prepare a notice of intent to issue a permit.

The Corps Division prepared a proposed permit, but predicated permit issuance on the expected success of on-

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[1] EPA's section 404(b)(1) Guidelines, which provide substantive environmental criteria used in section 404 permitting decisions, classify wetlands as "special aquatic sites," and characterize their degradation or destruction as "among the most severe environmental impacts covered by these Guidelines."

site and offsite mitigation and on steps to improve water quality. The proposed permit continued to characterize Sweedens Swamp as an excellent wildlife habitat.

EPA's Regional Administrator (Region I) Michael R. Deland, initiated section 404(c) action on July 23, 1985 by providing to the Corps and the applicant the opportunity for consultation on the discharge. FWS' Regional Director, by letter of July 25, 1985, indicated his support for EPA's action because the project would result in "significant avoidable adverse impacts to wildlife and to the wetland habitat upon which that wildlife depends." The Region entered into discussions with Pyramid and conducted a public hearing at which both supporters and opponents of Pyramid's mall spoke (the majority attending favored the mall). Over 1200 comments were received during the public comment period. After considering this information, and comments received by the Corps on Pyramid's offsite mitigation plan, the Regional Administrator on March 4, 1986 made a recommended determination to prohibit the specification of Sweedens Swamp as a disposal site for fill material.

The Recommended Determination (RD) was received in EPA Headquarters on March 5, 1986, and the administrative record was received on March 14, 1986. Meetings were held by the Assistant Administrator of External Affairs and by staff in EPA Headquarters with representatives of Pyramid on March 21 and 25, 1986, and with Department of Army/Corps of Engineers on March 27 and April 3, 1986. Meetings were also held with environmental and community interest groups on March 21, with representatives of New England Development on March 26, and with State and local representatives on April 4, 1986. In addition, several meetings were held with members of the U.S. Congress during the Headquarters' review of this case. Thousands of letters were received supporting the building of the mall; hundreds were received supporting a prohibition of the discharge.

The Assistant Administrator for External Affairs visited Sweedens Swamp, the North Attleborough Mall site, and the proposed Tiffany Street offsite mitigation area with EPA Region I staff on November 20, 1985.

Appendix A contains a month-by-month chronology of this case.

III. DESCRIPTION OF SITE

The detailed description of the 82-acre site and its present values which appears at Section III of the recommended determination is hereby incorporated by reference. The key points are summarized below.

The 49.5 acres of wetlands on the proposed project site are classified as palustrine forested, hardwood deciduous, seasonally flooded. They are characterized by a forest canopy consisting predominately of red maple trees over shrub and herbaceous layers. There are smaller areas of emergent wetland, shrub swamp, streams, and standing water in part of the wetland, which provide more diversity to the habitat.

The forested wetlands of the site have excellent vertical structure and provide habitat for several migratory bird species and a variety of resident mammals and amphibians. The wetlands also provide valuable summer habitat for many birds from surrounding areas which seek the abundant food sources (fruits and insects) as well as the shade and drinking water found there. Birds observed using the site include mallard and black ducks, the red-shouldered hawk and the red-tailed hawk (avian predators that feed on small mammals that inhabit wooded swamps), the swamp sparrow, the Kentucky warbler and the common yellowthroat. A full list of all the species observed using the site is included in the recommended determination.

Extensive adjacent development has made Sweedens Swamp an isolated or "island" wildlife habitat. While this

may restrict the number of species using the site, its size is sufficient to maintain a diverse resident wildlife population. Island ecosystems in highly developed areas are important because they provide the last remaining habitat for species that have been extensively disturbed.

The Corps and the FWS characterize the site's wildlife habitat as excellent. FWS designates the site as Resource Category 2, the second highest in its system for classifying habitat. The Massachusetts Division of Fisheries and Wildlife identifies the area as a "high-quality red maple swamp." EPA concurs that Sweedens Swamp provides excellent wildlife habitat.

A number of commenters have characterized Sweeden Swamp as a "dump." Trash and debris are present at the site, primarily along the highly visible perimeter and on the disturbed upland portions of the site. However, only a few scattered piles of debris litter the interior of the wetland; EPA estimates that dumping directly affects less than one tenth of the entire 82-acre site, little of that wetlands. Although unsightly to the casual observer, the refuse has little direct bearing on the wetland values provided by Sweedens Swamp. Parts of Sweedens Swamp have also been subject to other forms of human disturbance, for example, paving and motor bikes. While this may have some impact on species using the site, the Corps found that "large segments of wetland remain relatively isolated from human impact." EPA agrees that the habitat values have not been significantly altered by this disturbance.

Pyramid and others have described the site as a wetland "in name only" and contended that it "does not function as a true wetland." These assertions are incorrect. Based on the information in the record concerning soil characteristics, vegetation and hydrologic regime, Sweedens Swamp is a typical New England red maple swamp which provides excellent wildlife habitat. EPA does not concur

that Sweedens Swamp is a dysfunctional or low quality wetland.

Sweedens Swamp is also an effective area for storing flood water and moderating peak flows. Since the area draining into the wetlands is relatively small, these hydrologic values are important primarily when considered cumulatively. In terms of groundwater, this site acts mainly as a discharge area rather than a recharge area.

Because at least 30% of the total annual flow entering the site has the opportunity to contact vegetation, Sweedens Swamp has the capability to remove waterborne pollutants and to improve water quality.

In summary, Sweedens Swamp provides many wetland values such as wildlife habitat, food chain production, natural flood storage, groundwater discharge, and water quality renovation. While it is neither a unique wetland nor habitat for endangered species, this does not mean that Sweedens Swamp is unworthy of protection under the Clean Water Act. Average healthy functioning wetlands, such as Sweedens Swamp, comprise the bulk of our nation's wetland wildlife habitat.

IV. ADVERSE EFFECTS OF THE PROJECT

Construction of a large shopping center at Sweedens Swamp would drastically change the hydrology, soils, and biology of the area.

The location of the mall building, parking lot, and access roads are shown on Figure III. The western wetland basin would be completely filled. The mall itself would result in the filling of 32 acres of forested wetlands. Thirteen additional acres of forested wetlands would be excavated or otherwise altered to create marsh as part of the proposed onsite (i.e. work adjacent to the mall) mitigation.

The proposed onsite mitigation, if successful, would result in the conversion of 13 acres of forested wetlands

and nine acres of uplands to 22 acres of emergent wetlands, shrub swamp and open water. Four acres of the existing forested wetlands would be preserved within the proposed onsite mitigation area. Thus, of the existing 49.5 acres of forested wetlands, only four and a half acres would remain after the construction of the shopping mall as well as the onsite mitigation. (The onsite mitigation was designed, at least in part, to provide necessary restoration of flood storage capacity and to handle new water pollution from the proposed mall.)

A. Wildlife Effects

As discussed in Section III, Sweedens Swamp provides a large, diverse habitat for a variety of wildlife, particularly species of birds, small mammals, and amphibians, that are typical of New England forested swamps. A substantial part of this habitat would be eliminated or altered. The numerical habitat assessment model (Appendix B) confirms that the proposed project would adversely affect wildlife values, through the loss of both wetland and upland habitat. There would be an outright loss of 45 acres of forested wetland, and a significant loss of the existing value of wildlife habitat as illustrated by the model. The proposed shopping mall would affect wildlife that currently utilizes Sweeden Swamp and would also alter available wildlife habitat.

Construction activities within the proposed mall site would convert 32 acres of forested wetlands to uplands which, for the most part, will be non-vegetated impervious surfaces. The observed mammal species would retreat from construction activities. However, as previously discussed, Sweedens Swamp is an island habitat and is not connected to adjacent habitats. When construction on the mall site begins, mammals will be dispersed into remaining portions of Sweedens Swamp (depending, of course, upon how much of the onsite mitigation is completed before construction) and away from Sweedens Swamp. Since the areas in the

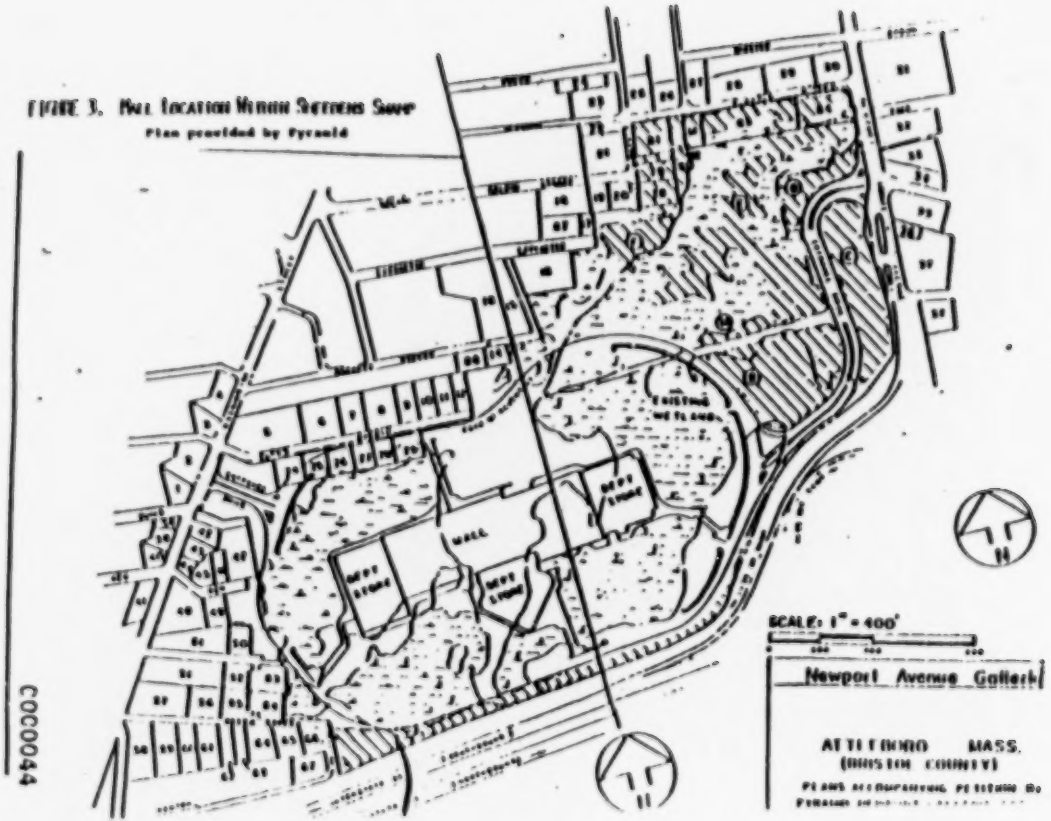
FIGURE 3. Mall Location Within Southern Sewer
Plan provided by Pyramid
SCALE: 1" = 400'
Newport Avenue Gallery
ATTLEBORO MASS.
(BRISTOL COUNTY)

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vicinity that might provide habitat for mammals displaced from Sweedens Swamp are not connected, it may be assumed that some of the mammals displaced from Sweedens Swamp would perish. Construction activities would also displace the bird species observed in Sweedens Swamp.

The displacement would particularly adversely affect nesting species, such as the northern flicker, gray catbird, song sparrow and white-breasted nuthatch, and species which prefer forested wetlands, such as the red-shouldered hawk and the Kentucky warbler. The remainder of the observed bird species are generalists and less specific in their habitat requirement. Therefore, it is assumed that, once displaced, these species will have a better chance of finding replacement habitat.

In addition to affecting wildlife that currently utilizes Sweedens Swamp, the project will also alter available wildlife habitat. From a broad perspective, the loss of forested wetland habitat would be permanent (with or without the proposed mitigation). From the mid-1950's to the mid-1970's the U.S. lost over six million acres of forested wetlands. Many Massachusetts Conservation Commissions, appointed bodies responsible for carrying out Massachusetts' wetlands law at the local level, have expressed grave concern over the potential loss of this amount of wooded swamp, as well as its precedential effect.

Pyramid proposes to attempt to compensate for adverse wildlife impacts at the site by altering existing wetland habitat and by creating wetlands from upland areas. This attempt at compensation involves both "onsite mitigation" (i.e., work adjacent to the mall itself) and "offsite mitigation" (i.e., work at a sand and gravel mining site on Tiffany Street approximately 2 miles from the proposed mall site).

Turning first to onsite mitigation, Pyramid's proposal consists of attempting to create emergent marsh, shrub swamp and open water from existing wooded wetland and

upland. Because only four acres of the wetland would be left in its natural state, the initial dredging and filling of the site would destroy nearly all its existing value for wildlife. The onsite mitigation area would also have minimal value immediately after excavation and regrading. If wetland vegetation in the mitigation area were successfully established, wildlife would probably begin to resettle in the area; however, the degree of resettlement may be affected due to greater disturbance from the activity at the mall. The low profile emergent wetlands proposed for this area would not buffer wildlife from disturbance of the highways (much less from the mall itself) as effectively as the existing wooded habitat does. Even if successfully established, the onsite wetlands would be substantially smaller and of a different type than those lost. The vegetation in these wetlands, although potentially producing more pounds per acre per year, would exhibit less spatial heterogeneity, structural diversity, and standing biomass than the existing swamp. Further, these new wetlands would not provide habitat for the same numbers and types of species displaced or eliminated. The habitat assessment also shows that there would be a substantial drop in both wetland acres (-23) and wildlife habitat values.[2]

In an attempt to offset the net loss of habitat value at Sweedens Swamp, Pyramid proposed additional offsite mitigation. This additional mitigation would occur at a location two miles away where Pyramid would attempt to create 36-acres of emergent wetlands, shrub swamp and open water from an existing 30 acres of upland and 6 acres of open water. The habitat assessment model indicates that, even if 100% successful, the net increase in habitat values at this offsite location would not compensate for those lost

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[2] This net loss is demonstrated numerically in Appendix B. However, as the Appendix explains, the results of the numerical habitat assessment must in any case be viewed with caution because several factors may affect the precision and accuracy of the results.

at the proposed shopping mall site. Although Pyramid plans to provide a net increase of six acres of wetland under its mitigation proposal, any increase in wetland acreage (or numerical habitat values) will come at the expense of existing wetland and upland areas and their respective numerical habitat values. Pyramid has stated that, unless required by EPA pursuant to its section 404(c) authority, it would not have the offsite mitigation in place and functioning prior to beginning work at Sweedens Swamp.

As previously mentioned, the proposed onsite and offsite wetlands, if successful, would provide habitat for a different species mix than that currently utilizing Sweedens Swamp. These include waterfowl, shorebirds as well as a potentially different species mix of mammals, reptiles and amphibians. However, many of the small mammals and bird species typical of Sweedens Swamp would not usually use the new wetlands. While some species of wildlife might migrate to the created wetlands, their numbers and variety would not be the same as exist at Sweedens Swamp. A recent study[3] in Massachusetts suggests that breeding bird communities in forested wetlands are significantly related to vegetation structure and hydrology. The study found that, generally, the most structurally diverse and most poorly drained forested wetland sites (such as Sweedens Swamp) have the most abundant and diverse breeding bird populations. In addition, raptors (predatory birds) such as the red-shouldered hawks observed at Sweedens Swamp would be especially affected. Recent research by the USFWS[4] in Connecticut indicates that these predatory birds are consistently associated with mature, bottomland forests and may be particularly sensitive to land pattern changes in their habitats.

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[3] Swift, B.L., J.S. Larson and R.M. DeGraff. 1984. Relationship of Breeding Bird Density and Diversity to Habitat variables in Forested Wetlands. The Wilson Bulletin, Vol. 96(1): 48-59.

[4] USFWS Research Information Bulletin No. 85-19, November 1985.

B. Hydrological Effects

Based on the record, the impacts to surface water quality from the proposed project appear to be minimal in comparison to other sources of contamination that already exist in the Ten Mile River watershed, although the amount of pollution from the mall site will increase the overall pollutant load to the watershed. The amount of surface water degradation resulting from mall construction and use will not itself be very significant if effective erosion and turbidity control structures are installed during construction and surface water runoff quality is maintained at acceptable levels. In view of the small watershed and associated flows and Pyramid's specific on-site plans, no significant adverse effects on downstream flooding are anticipated as a result of the completed project. It also appears that there would not be adverse impacts from Pyramid's proposed project upon public drinking water supplies, including the Seekonk Water District wells, if effective erosion and turbidity control structures are installed and maintained during construction and surface water runoff quality is maintained at acceptable levels, in accordance with the proposed permit conditions.

Summary

Pyramid's proposal would have an immediate and adverse impact on wildlife habitat. Thirty two acres of wetland with high habitat value would be filled. Moreover, the value of these wetlands to store flood waters, discharge groundwater, and maintain water quality would be lost. In order to provide compensatory flood storage and attempt to replace other wetland values, Pyramid would dredge or fill all but four acres of the remaining forested wetlands and upland. Even assuming full success of the onsite mitigation proposals, there would be a net loss of nearly 24 acres of wetlands and a concomitant decrease in the wildlife value of the site. In an attempt to provide additional compensation, Pyramid proposes to construct 36

acres of artificial wetlands at an offsite location. These wetlands, even if successful, would not serve the same species mix destroyed and therefore would not fully replace the lost habitat values at Sweedens Swamp as calculated by the habitat evaluation method (Appendix B). Thus, the offsite mitigation does not substitute for, but rather seeks to compensate for, the loss of wetlands at Sweedens Swamp.

However, given the circumstances surrounding the Sweedens Swamp site, it does not appear, based upon available information, that the proposed Attleboro Mall project with successful onsite mitigation would materially adversely affect downstream water quality, flooding or drinking water supplies.

In short, the proposed mall project, even with successful onsite mitigation, would have adverse impacts on wildlife values protected by section 404(c) of the Act. In determining whether these adverse impacts are unacceptable, it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are practicable, less environmentally damaging alternatives to the proposed project.

V. ALTERNATIVES TO THE PROPOSED PROJECT

A. Why alternatives are relevant

In determining whether a proposed project would be likely to have an "unacceptable adverse effect" on the aquatic environment, EPA must evaluate both the loss of the resource and the unacceptability of that loss. The section 404(c) regulations state that relevant portions of the section 404(b)(1) Guidelines (40 CFR Part 230) should be

considered in judging the unacceptability of a discharge under section 404(c).[5]

Concern has been expressed that EPA is, in considering the issue of practicable alternatives in a section 404(c) action, in effect "second-guessing" the Corps.

EPA's statutory role is not to duplicate the Corps' exercise of its statutory responsibility of issuing or not issuing permits. Rather, EPA's statutory role is to determine whether filling a particular aquatic site would have an "unacceptable" adverse effect on the resources enumerated in section 404(c). As a matter of common sense, as well as regulatory practice, the "acceptability" of an adverse effect may depend on the extent to which that effect is avoidable. The alternatives provisions, as well as other portions of the section 404(b)(1) Guidelines, thus are necessarily relevant to a section 404(c) determination.

Further, the mission of EPA is to protect human health and the environment. In this 404(c) proceeding, the impact of mitigation is a scientific assessment for which EPA has particular expertise. The status and uncertainty of mitigation science must be evaluated in the context of the status and certainty of natural environmental values being lost. Because the science of mitigation is, in EPA's judgment, uncertain and high-risk, the section 404(c) decision must analyze the necessity, or unavoidability, of the natural wetland loss.

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[5] Section 231.2(e) defines "unacceptable adverse effect" as:

> impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 C.F.R. Part 230).

See also preamble to the regulation, 44 Fed. Reg. 58076 (October 9, 1979).

The Guidelines implement the CWA's goal of maintaining and restoring the chemical, physical, and biological integrity of the nation's waters. The Guidelines direct the avoidance of wetland destruction where possible, through the so-called "alternatives test."[6] When applied to wetlands, the alternatives test sets forth two rebuttable presumptions: 1) that for non-water dependent activities (such as shopping malls) there exist practicable alternatives to the discharge which do not involve wetlands; and 2) that such alternatives have less adverse impact on the aquatic ecosystem.

The rebuttable presumption that other practicable alternatives exist for nonwater dependent projects serves two functions. First and most importantly, it directs de-

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[6] Section 230.10(a) provides, in pertinent part:

1. Except as provided under section 404(b)(2) [pertaining to navigation] no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

2. An alternative is practicable if it is available and capable of being done, after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered.

3. Where the activity associated with a discharge which is proposed for a special aquatic site [defined in Subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

velopment away from sensitive aquatic resources. Second, it reserves such sites for projects which by their nature require access to water. The presumption correctly and logically recognizes that non-water dependent projects can usually be located someplace other than wetlands, whereas the range of options for water-dependent projects is, by definition, usually more limited.

In the present case, one of the most contentious points is the issue of practicable, less damaging alternatives. Accordingly, this final decision now discusses whether the loss of Sweedens Swamp is an avoidable loss.

B. Practicable alternatives

To be considered "practicable" an alternative must be both feasible and available.[7] But, as indicated, the applicant must present sufficient evidence to overcome the presumption that practicable alternatives are available. The record compels the conclusion that Pyramid has not rebutted that presumption.

Feasibility

Under the Guidelines, an alternative must be capable of satisfying the basic, or overall, purpose[8] of the proposed project (taking into account cost, technology, and logistics). 40 C.F.R. §230.10(a)(2). The applicant's proposal is obviously the starting point for identifying the basic project purpose; the Guidelines' alternatives analysis does not examine alternate uses of the project site in question, but

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[7] 40 C.F.R. §230.3(q) provides: "The term 'practicable' means available and capable being done after taking into consideration costs, existing technology, and logistics in light of overall project purposes."

[8] The preamble and the regulations use the terms "basic project purpose" and "overall project purpose" interchangeably. The preamble clearly supports the position that "basic purpose" refers to the general function of the proposed activity, not its specialized details (45 Fed. Reg. 85339 (December 24, 1980)), and in practice, EPA has consistently so interpreted the terms.

rather alternate sites (or designs) for the basic project purpose. *Louisiana Wildlife Federation* v. *York*, 761 F.2d 1044 (5th Cir. 1985).

The Guidelines do not demand an acceptance of literally every aspect of a developer's characterization of his "project purpose." However, in this case, the leading alternative site is capable of serving a strikingly similar project. Pyramid's project is a shopping mall, and the search for alternatives revolves around sites suitable for a shopping mall (or alternative designs at Sweedens Swamp). As discussed below, the marketplace has found that a nearby site is suitable for a virtually identical regional shopping mall: a "quality" fashion-oriented enclosed mall with nearly the same square footage and three anchor department stores, serving the same trade area. There is no convincing basis in the record for finding that such an alternative would not serve the same "basic purpose" as Pyramid's project.

Primary attention has focused on a site known as the North Attleborough site, located immediately south of the interchange of U.S. Route 1 and I-295, approximately three miles north of Sweedens Swamp on Route 1. It is approximately 57 acres in size and is zoned for commercial use. New England Development, Inc. (formerly State Properties of New England) currently controls the site, on which it plans to build a regional shopping mall comparable in size and character to Pyramid's proposed Newport Galleria. In its July, 1984, 404 permit application, Pyramid stated that it had rejected the North Attleborough site on the grounds that it was not feasible to Pyramid's purpose, and thus, Pyramid stated, it was not a practicable alternative for its mall.

As a general matter, an applicant's submission of information clearly within its expertise is normally accepted by the Agency. Where the information seems in conflict with other available information, however, EPA must ex-

ercise its independent judgment to determine the matter at issue. Here, the marketplace evidence compels EPA to conclude that the North Attleborough site is feasible, notwithstanding Pyramid's rejection of it. As noted above, New England Development, Inc., an established developer in the region, plans a similar shopping mall at the site. The company has invested over $2 million at the mall site, has successfully pursued the necessary zoning, has done extensive engineering work, had contacted potential tenants, and has completed a State Environmental Impact Report. The willingness of an established developer to invest this time and effort into developing the North Attleborough site is strong evidence that it is a feasible site.[9] Furthermore, this already convincing market place evidence is also supported by the conclusions of an independent consultant to the Corps of Engineers in January 1985 that the North Attleborough site was a feasible site for a regional shopping mall.

As detailed in the recommended determination, Pyramid has raised numerous specific objections to the North Attleborough site in an effort to justify its own rejection of the North Attleborough site. While I believe the market place evidence is itself sufficient evidence of feasibility in this case, I nonetheless considered Pyramid's specific comments.

Pyramid contends that the North Attleborough site is "too far north" of the primary trade area it had delineated. Even accepting Pyramid's delineation of the primary trade area, I find Pyramid's arguments unconvincing on this point. The site, located near the geographic center of Pyramid's trade area, is only three miles north of Sweedens Swamp, and only six minutes (driving time) further from the densely populated sections of the trade area. It

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[9] Of course, feasibility does not guarantee success—whether for an inherently risky shopping center business or for other commercial endeavors.

is still within a 15-20 minute drive from the farthest (i.e., southern) fringe of the trade area, and it is a mere two miles west of Interstate 95. The consultant retained by the Corps states in his analysis of feasible sites that the location of the North Attleborough site is "almost ideal" from a market point of view. The marketing analysis conducted for New England Development reaches a similar conclusion. Thus, I find that the record shows that the North Attleborough site is a viable location for a shopping mall of this type, in the same trade area.

Further, Pyramid argues that the North Attleborough site is not visible from I-95 and therefore will be unable to attract sufficient shoppers. First, it should be noted that the North Attleborough site is located at an interstate highway interchange (I-295 and U.S. Route 1). The Corps' consultant's report on feasibility notes that visibility from both I-295 and Route 1 is excellent. The consultant's report also concludes that visibility in general is not an "overly important" consideration.

Pyramid asserts that highway access to the North Attleborough site is poor. However, New England Development's consultant, Realty Development Research, Inc., concludes that the site enjoys good access within the trade area. The Corps consultant also states that the location provides "excellent" road access via I-95, Route 1, Route 1A, and I-295. While the latter roads are currently less well traveled than I-95, he concludes that a mall at the North Attleborough site will create its own traffic by providing its own draw.

Pyramid also states that the site is too small to support a shopping mall. The proposed square footage and "footprint" of each development are roughly equivalent; thus the record provides no evidence that the North Attleborough site is too small.

In some of its later submissions, Pyramid states that one of the main reasons it rejected the North Attleborough

site was because of improper zoning (at the time it was evaluating the site). However, in its October 1984 supplement to its 404 permit application, Pyramid states quite clearly that the site was not rejected because of its improper zoning. Pyramid explained that "[m]ost large regional shopping center sites have zoning, infrastructure and environmental constraints at least as severe as those affecting the North Attleborough I site. Had the . . . location been acceptable, this site would have warranted our attention as a practicable alternative . . . ." In fact, the zoning of the site has, through New England Development's efforts, been changed to accommodate a regional shopping mall.

Pyramid also states that past failures at the North Attleborough site demonstrate its infeasibility. However, the same could be said for Sweedens Swamp, scene of at least two prior failures. Moreover, the record indicates that the market has been improving and is currently strong and that New England Development has not reached any major obstacles to date. Accordingly, I do not find Pyramid's reference to past failures persuasive on this point.[10] While some retailers apparently have a strong preference for locating at Sweedens Swamp (some planning to locate there have indicated that that is the only site in the market they would accept), the record nonetheless indicates that a North Attleborough mall will still be able to attract tenants, and is indeed competing vigorously for some of the same anchor stores.

Finally, Pyramid and others urge rejection of the North Attleborough site due to various practical problems, in-

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[10] Pyramid has also cited the failure of anchor stores at the Lincoln Mall on Route 295 as evidence of the unsuitability of such a location. However, the record indicates that the two anchors closed, not because of dissatisfaction with the location but rather because the retail chains of which they were part folded. The Mall quickly replaced the anchors (one replacement was in and operating in 4-5 months), and in fact the Mall is planning to expand to three or four anchors.

cluding traffic and water quality concerns, the proximity of an elementary school, and public opposition to the project. As previously noted, Pyramid itself recognizes that any large development is likely to pose difficulties that will require time, money, and proper planning to overcome, and the North Attleborough site is no exception. Some specific concerns raised by Pyramid and others are addressed in more detail in Appendix D. Here, I will simply note that many of the difficulties at the North Attleborough site also confronted Pyramid at the Sweedens Swamp site, including water quality, flooding, and traffic concerns, and the proximity of an elementary school. Public support and opposition exist at both sites. There is, in short, no evidence that the North Attleborough site presents unique or insurmountable problems.

Moreover, the fact that other established developers have elected to pursue quality regional malls in the vicinity at sites which do not meet Pyramid's stated criteria strongly suggests that Pyramid's criteria are not dispositive.[11] In Pyramid's view, the Sweedens Swamp site is by far the preferred site (with its "excellent" location, access, and visibility), and that may well be the case from strictly an economic perspective. However, whether the North Attle-

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[11] New England Development's enterprise has already been described. In addition, another developer, Marathon Group of Companies, Inc., has announced plans to build a comparably scaled quality merchandise regional shopping mall anchored by three department stores in Seekonk, Massachusetts. The Seekonk site is a 79 acre parcel of land located on the southern side of Route 6 in the town on the southern border of the City of Attleboro, and is bordered to the west by East Providence, Rhode Island. The site is within a half mile of Interstate 195, and approximately five miles from I-95 and seven to eight miles from Sweedens Swamp. The site is currently an abandoned drive-in theater and vacant land. The Seekonk site is located in the southeast portion of Pyramid's defined trade area, one of the most densely populated sections of that trade area according to Pyramid's 1983 retail market analysis. The Seekonk site would likely serve a market that significantly overlaps, but is not identical to, the market delineated by Pyramid.

borough site is or is not the *best* site within the trade area from a specific applicant's business perspective is not the issue. The practicable alternatives test requires only that other sites be feasible, not that they be equal or better.[12]

Availability

The other aspect of practicability is "availability," i.e, whether an alternative which is otherwise suitable for the basic project purpose is "available" for that purpose. The Corps and Pyramid believe that availability should be viewed as "availability to the applicant." I agree that "availability to the applicant" is the correct test to apply to this case. However, I still conclude based on the record that the North Attleborough site must be deemed available to Pyramid.

Pyramid has argued that the North Attleborough site cannot be considered available to it because a competitor controls it and presumably will not sell to Pyramid. I agree that there is no reason to believe that New England Development will sell to Pyramid.[13] However, I do not agree that the analysis should stop there.

The Clean Water Act and the 404(b)(1) Guidelines were intended to avoid unnecessary filling of wetlands and to require a prospective discharger to take a hard look *before* concluding that upland sites are not available. I do not believe that the Guidelines can, or should, be read as lim-

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[12] Since an applicant presumably usually selects the site which is best from his perspective, alternatives are almost by definition "second best;" to eliminate non-wetland sites on that basis would be inappropriate.

[13] That is not to say that New England Development could not have been talked into relinquishing its interest in the site at an earlier stage. In its October 1984 supplemental application to the Corps, Pyramid asserted (at 21), "[O]ur competitor. . .has spent little, if any, money on their attempt to develop this site. The current landowner, Allan Riley, is the primary financier of this effort. Mr. Riley is driven by a need and desire to rid himself of a vacant parcel with which he has been burdened for over five years."

iting the inquiry on availability solely to the time after an application is filed. It is both fair and consistent with the Guidelines to review the period of availability as including the period when the developer is selecting a site for its project.[14]

There are several reasons for this. First, in a situation where two parties contemporaneously enter the same market area for the same purpose, and one decides to option an upland site (thereby avoiding wetland destruction), while the other selects a wetland, such a "present ownership" test would turn the guidelines on their head and penalize the competitor who heeded the guidelines and pursued the upland site.

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[14] The issue addressed here relates particularly to circumstances where a developer or developers are entering a market area for the accomplishment of a specific project. I need not, and do not, decide here what the relevant time period would be in other circumstances—e.g., where an applicant wishes to build on property inherited or acquired long ago.

Pyramid now argues that the language of the guidelines speaks exclusively in the present tense with respect to the availability of alternatives—e.g., "An alternative is practicable if it *is* available . . ." 40 C.F.R. §230.10(a) (emphasis added). It is clear, Pyramid contends, from the use of the present tense that availability must be determined as of the time of the application.

That reading of the regulatory language is too cramped. The use of the present tense was intended to ensure a temporal matching of the requisite alternatives analysis and the availability determination. Indeed, in discussing practicability in its supplemental application to the Corps, Pyramid itself argued that the appropriate time for judging alternatives was when the applicant was reviewing alternatives and deciding on a course action. (Supp. App. at 20.)

The principal I have set forth in this case does not require (or permit) an open-ended historical review of whether an alternative site was ever available during an applicant's corporate or personal existence. Rather I have given the language the common sense reading that the review of alternatives and their availability are necessarily linked in time. This presents no conflict with either the language of the Guidelines or EPA's past practice.

able. To make such a finding would be particularly inappropriate in this case since Pyramid bought Sweedens Swamp with full awareness of the environmental concerns posed by destroying the swamp and with a full appreciation of the importance of finding an alternative site.

The special circumstances of this case argue for an additional, though subsidiary, basis for considering the North Attleborough site as one available to Pyramid. Pyramid chose to be considered as Attleboro Mall, Inc., for the purpose of avoiding the State's new stringent environmental regulation. Logic indicates that Pyramid is likewise bound by alternatives available to Attleboro Mall, Inc., and the record shows the North Attleborough site was available to Attleboro, Mall, Inc., Pyramid's acquired affiliate.

On March 13, 1985 the State Department of Environmental Quality Engineering (DEQE) granted a State permit to Attleboro Mall, Inc., an acquired affiliate of Pyramid, for the filling of Sweedens Swamp. This decision followed a lengthy adjudicatory hearing, in which one of the issues was whether Attleboro Mall, Inc.'s proposed mall could be treated as a continuation and improvement of the earlier mall proposals made by Mugar and DeBartolo,[17] or whether the revised and now Pyramid-controlled project had to start the state process anew. The DEQE agreed with Pyramid and ruled that a successor in interest could substitute itself for the prior owner and

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[17] The original notice of intent was filed by the Mugar Group, Inc./ Federated Stores Realty, Inc. in March, 1979. The local Conservation Commission's approval of the project was appealed to DEQE. During the appeal process, Mugar conveyed ownership of the Sweeden Swamp site to Attleboro Mall, Inc., then an affiliate of the Edward J. DeBartolo Corporation. In April, 1982 DEQE issued a Superseding Order to Attleboro Mall, Inc., denying the project. Subsequent to the denial, apparently in December 1983, Pyramid obtained control of Attleboro Mall, Inc. and pursued a challenge of the DEQE denial through an adjudicatory hearing.

continue in the proceedings without filing a new notice of intent.

Pyramid's claim that it should assume the rights of the original applicant for the State permit meant that Pyramid's proposal was evaluated by the State under regulations that had been in force at the time of the original permit application, rather than under the more stringent regulations which took effect in 1983. The applicability of the old regulations was critical to Pyramid since the new regulations prohibit the filling of more than 5000 square feet of bordering vegetated wetlands.[18] 310 C.M.R. 10.55. This fact was acknowledged by the State in its final decision.

Since Pyramid acquired the rights of its predecessor, logic would have it be bound by the obligations of its predecessor—including the obligation to choose an upland alternative. I believe that alternatives available to Attleboro Mall, Inc. while it was under the control of either DeBartolo or Pyramid should be considered.[19]

The North Attleborough site is one such site. It was clearly available for purchase prior to New England Development's acquisition of control over it. In fact, the record indicates that the DeBartolo Corporation expressed an interest in the site to a local realtor who was offering it, and even exchanged some papers, but did not pursue an acquisition. These circumstances reinforce the conclusion that Pyramid has not met its burden of proving that the North Attleborough site was not available to it.

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[18] Pyramid proposes to fill approximately 1,400,000 square feet of bordering vegetated wetlands.

[19] The Newport Galleria Group, another Pyramid affiliate, applied for the federal permit. On February 10, 1985, Attleboro Mall, Inc. conveyed the Sweedens Swamp site to the Newport Galleria Group for $10.00.

C. Less environmentally damaging alternatives and mitigation

The alternatives requirement also takes in account comparative environmental impacts. The alternatives test provides that "no discharge of dredged or fill material may be permitted if there is a practicable alternative to the discharge *which would have less adverse effect on the aquatic ecosystem*, so long as the alternative does not have other significant adverse environmental consequences." 40 CFR §230.10(a) (emphasis added). However, alternatives "which do not involve a discharge into a [wetland] are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." §230.10(a)(3) (emphasis added).[20]

Turning to this case, the record demonstrates beyond doubt that locating a shopping mall at the North Attleborough site would have less adverse impact on the aquatic ecosystem.[21] For example, the North Attleborough site has less than one acre total wetlands, scattered in small pieces, compared to the 32 acres to be filled at Sweedens Swamp. (Although New England Development plans some retention

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[20] As noted by both the Corps of Engineers and the recommended determination, a threshold issue is whether offers of mitigation (i.e., compensatory wetland creation) should be considered in comparing the impacts of the project at the proposed site and at alternate sites. General Wall's "Views of the Chief of Engineers" recognized that allowing compensatory mitigation to be factored into the alternatives analysis "is somewhat problematic, because if not implemented carefully, it could serve to weaken or subvert key provisions of the current 404(b)(1) Guidelines" and be counter to the Guidelines' obvious intent (although he concluded that exceptions could be made in "proper cases"). For the reasons discussed below, I conclude that mitigation should not be included in my alternatives analysis in this case. Accordingly, the following environmental analysis of the alternate sites identified above properly focuses on the impacts of the project without the "add-on" mitigation.

[21] In fact, this is so even if one were to consider Pyramid's onsite mitigation offer as part of the project itself.

basins on an adjacent parcel which has some larger wetlands, the basins will not encroach on those wetlands.) Furthermore, construction of a mall there need not have more impacts of concern downstream than at Sweedens Swamp.

Under the Guidelines, the alternatives inquiry does not end here. I must also consider whether there are other significant adverse environmental impacts. As a general matter, both sites will accommodate the same basic project; and there is nothing in the record to suggest that air, noise, trash, etc., impacts of a mall will not be largely comparable at Sweedens Swamp and the North Attleborough alternative site. The regulations contemplate that only unusually significant upland impacts would override wetland impacts. No such significant impacts are present in this case. In fact, the Corps concluded that, mitigation aside, the North Attleborough site "has much less value for wildlife" than does Sweedens Swamp.

I recognize that both the wetland and upland at issue here offer "wildlife" habitat. However, wetlands are scarcer than uplands and historically have been lost at a much higher rate. In addition, wetlands serve a variety of ecological functions of which wildlife habitat is only one. For example, these functions include significant water purification functions, flood and storm water storage, groundwater recharge or discharge areas, and food chain production, spawning and rearing sites as well as general habitat. Hence, as a generality, acre per acre, loss of wetlands is considered more significant than development of uplands. Furthermore, in this case, Sweedens Swamp serves as a more effective sheltering urban island habitat. Also, the larger habitat complex, of which the North Attleborough site is part of, unlike Sweedens Swamp, will continue to provide wildlife support functions even if a mall is built.

Finally, I have considered the question of whether Pyramid's proposed offsite creation of a new wetland should be viewed as establishing the Pyramid project as "environmentally preferable" to any other alternative.

This case involves an extensive wetland fill, and an evolving offer to create a large scale wetland complex out of a mostly upland gravel pit. The record raises concerns about the short-term and long-term viability of the mitigation, as well as its enforceability. Under the circumstances, given the large size of the proposed mitigation, the state of the science of artificial wetland creation, the purpose of the alternatives analysis, and the avoidability of the loss of this particular wetland of proven value, I do not believe that the proposed mitigation plan is of such clear environmental benefit that it can justify the unnecessary destruction of an existing wetland.

The offsite mitigation proposed here involves creation of a 36 acre wetland from 30 acres of upland gravel pit and 6 acres of open water at Tiffany Street, over a mile from Sweedens Swamp. The plan calls for the excavation to create weepage faces of groundwater to induce surface water flow, and the mixing of peat with the top foot of substrate to create a "wet mix" to provide conditions to enhance the growth of wetland vegetation (mostly emergent herbaceous vegetation and some shrubs, rather than trees). The onsite mitigation proposal involves the excavation of 9 acres of upland and the conversion of 13 acres of wooded swamp, to create 22 acres of open water habitat and marsh. Pyramid has said it would not challenge EPA if EPA required that the Tiffany Street site be completed prior to construction of the Mall. Pyramid has also stated at various times that it believes that establishment of the Tiffany Street site would take only a few months or 1-3 growing seasons,[22] although scientific uncertainties asso-

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[22] See e.g., affidavit of John A. Bersani, dated August 23, 1985, at paragraph 29.

ciated with such a large man-made wetland, created from predominantly upland, suggest that that is optimistic. The onsite mitigation would necessarily require the concurrent alteration of Sweedens Swamp.

Without in any way questioning Pyramid's good faith, I nonetheless believe that this proposal presents substantial risks and uncertainties. While considerable work has been done in wetland restoration and enhancement, the science of wetland *creation* is much less advanced. This is not surprising considering that when wetlands are artificially created, a successful combination of engineering and environmental management techniques is required in order to attempt what it may take natural systems centuries to do.

For example, analysis of the literature indicates that simply creating the requisite "structure" does not guarantee that a wetland ecosystem will function as intended.[23] Indeed, the preface (at pp. 4, 11) to the Massachusetts wetland regulation premises its blanket prohibition against filling more than 5,000 square feet of bordering vegetated inland wetlands on the fact that "[t]he complex natural functions of these wetlands cannot be replicated, and no amount of engineering will enable such areas to be filled or substantially altered without seriously impairing the statutory interests they serve," particularly water quality and habitat. For these reasons, Pyramid's offer of a 5-year performance bond is of limited utility to ensure success of mitigation.

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[23] LaRoe, E.T. 1979. The biological basis for estuarine ecosystem mitigation, pp. 90-92. In G.A. Swanson (Technical Coordinator) 1979. The Mitigation Symposium: A National Workshop on Mitigating Losses of Fish and Wildlife Habitats. General Technical Report Station, USDA Forest Service, Fort Collins, Co.; Gonor, J.J. 1979. Id. at 92-93: Race M.S. and Christie, D.R. 1982. Coastal Zone Development: Mitigation, Marsh Creation and Decision-making. Environmental Management 6:317-328.

Moreover, particularly until it is well established, a created wetland is especially vulnerable to a number of forces. These include fluctuations in its energy signature (i.e., fluctuations in hydroperiod, hydrologic energy, and nutrient availability), factors that shape the wetland development process (i.e., temperature, fire frequency, salinity, and herbivores), and colonization by pioneering species, many of which are noxious weeds that are not indigenous species (i.e., purple loose-strife and other "nuisance" plants are prone to invade and dominate disturbed wetland areas). Even if the above vulnerabilities are overcome, it can take seasons until an inland marsh is established, and decades for a shrub or wooded swamp. Consequently, it takes a considerable period of time to be sure that a wetland has become successfully established and even then there is some uncertainty as to how well it will function, both objectively and relative to the wetland it is designed to replace. These uncertainties, and the consequent need for long-term monitoring, increase with the size of the project.[24]

Pyramid's proposal involves frontiers of science. It appears to be one of the largest wetland creation projects of its type to date. (While larger scale projects have been cited, such as the Ducks Unlimited effort in Canada, they involve essentially wetland enhancement, not creation.) The site presents complicated questions of hydrology. No satisfactory source of peat for the wet mix has even been identified to date. At the Corps' request, Pyramid has submitted extensive historical records on precipitation, groundwater and surface water fluctuations as well as information on the hydrological performance of the wet mix, which the Corps is still evaluating in an effort to address the uncertainties of Pyramid's offsite mitigation's success.

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[24] *Wetlands: Their Use and Regulation*, Washington, D.C., U.S. Congress, Office of Technology Assessment, OTA-0-206, March 1984.

Those uncertainties take on a particular importance in light of the fact that the mitigation is proposed to replace an existing, stable, functioning wetland whose loss is unnecessary. I must consider the role of mitigation in light of the purpose of the alternatives analysis to avoid loss of wetlands where possible. As the preamble to the Guidelines notes, that purpose "was to recognize the special values of wetlands and to avoid their unnecessary destruction, *particularly* when practical alternatives were available in non-aquatic areas to achieve the basic purposes of the proposal." 45 Fed. Reg. 85339 (December 24, 1980). I cannot find that the policies of the Guidelines, or indeed the Act, would be well served by assuming the risks of Pyramid's proposed wetland creation where there is a feasible, available, upland alternative. The availability of the mitigation option in such a case would undercut the incentive to seriously and carefully examine non-wetland alternatives.

The Corps also expressed concern about the precedential significance of allowing a mitigation proposal to obviate the alternatives test, but believed that the approach it took in this case could be confined to a limited and proper set of circumstances. I am not so confident. This is not a minor project; it is not a scientifically certain project. To accept it under these conditions would, in my view, encourage developers to seek novel mitigation measures, not alternatives, and would undermine the predictability of the permit process. We would find ourselves drawn, as in this case, into assessments of mitigation approaches for which we will be able to make, at best, only qualitative judgments based on uncertain knowledge. As the technology develops, there might well be a case in which even offsite, out of kind wetland creation would be so beneficial and so reliable as to justify an exception. This plainly is not the case here.

Furthermore, Pyramid's proposal, even if successful, would not provide the same kind of habitat as that which

would be lost at Sweedens Swamp. Sweedens Swamp is a wooded swamp which provides vertical heterogenity, and heavy cover, and supports a particular mix of bird, mammal, and amphibian species. The Tiffany Street site, if successful, would provide largely marsh and open water, with some shrub swamp, and would be designed to support a somewhat different mix of species. It is also physically separate from Sweedens Swamp, with no ground corridor between the two.

These differences further reinforce my conclusion that it would be inappropriate in this case to let an offer of manmade wetlands override the Guidelines' policy of avoiding losses where practicable. The aquatic ecosystem is one in which each piece plays a role in the whole. Wetlands are not fungible (that is, ecologically interchangeable). Thus, when one creates a mitigation wetland, one is not necessarily restoring what was lost, one is simply attempting to compensate. Even where two wetlands both serve the same generic "wildlife habitat" function, there may still be differences which prevent their being wholly interchangeable. The extent of discrepancy between what one loses and what one creates is not fixed; it obviously increases as one substitutes one kind of wetland (e.g., marsh) for another kind of wetland (e.g. swamp) or for open water; as the distance between the former and new wetlands increases; or as other variables are introduced. In short, even if one assumes created wetlands will be successfully established, there are fundamental questions about what wetland compensation can promise as true replacement.[25]

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[25] In a recent study of wetland use and regulation undertaken by the Office of Technology Assessment at the request of Congress, the authors warned of the need for judicious review by federal agencies of wetland construction proposals:

> *The ability to construct new wetlands should not be used as sole justification for the unregulated conversion of wetlands to other*

I do not mean to downplay the value of mitigation in the appropriate context. Where a wetland loss *is* unavoidable and the discharge does not cause or contribute to "insignificant degradation," EPA encourages consideration of mitigation. Furthermore, manmade wetlands may play a valuable role in waste water management. Indeed, EPA is devoting resources to research in both those areas. However, the case before me does not involve either of those situations.

VI. FINAL DETERMINATION

The mission of the Environmental Protection Agency is to protect human health and the environment. In interpreting our administrative responsibilities as mandated by law, regulation and administrative directive, we must conduct our activities with fulfilling that mission constantly in mind.

The Clean Water Act, section 404, directs a special emphasis to our nation's waters, including special aquatic sites such as wetlands. Regulations written pursuant to Section 404(b)(1) incorporate a crucial environmental standard that forbids avoidable destruction of wetlands. The question of avoidability is answered through the practicable alternatives test, more commonly known as the "water dependency" test. The section 404(b)(1) Guidelines direct that when a project which is not water-dependent (for example, a shopping mall, which need not be constructed on or near waters of the United States) is proposed for a permit to fill waters of the United States, there must be a rebuttal of the regulatory presumption that there are no upland alternatives available to meet its objective.

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uses: manmade wetlands do not necessarily provide the same values as natural ones. (emphasis in original)

Office of Technology Assessment report, *supra* at 117, 130-31

Section 404(c) of the Clean Water Act provides the Environmental Protection Agency the authority and responsibility to review and to condition or prohibit discharges into waters of the United States when certain unacceptable environmental effects would result from the project's construction.

Mindful of the mission of this Agency, the intent of the Clean Water Act, historical loss of approximately half of United States' wetlands, and the continued cumulative national loss of approximately 300,000 wetland acres annually, which affects wildlife, flood protection and water quality, fish, shellfish, and water supply, I began a careful review of the case before me.

Sweedens Swamp is a typical well-established, functioning, red maple swamp which provides excellent wildlife habitat for a variety of birds, mammals, and amphibians, and provides flood storage capacity, groundwater discharge and water purification. Pyramid's proposed shopping mall will result in the destruction of approximately 45 out of 49 acres of this wetland habitat. Thirty two acres would be permanently destroyed, and although Pyramid has offered to recreate other wetlands on the site, doing so would result in the at least temporary destruction of 13 of the remaining 17 acres of wetland habitat. These losses are not necessary in order to have a quality fashion-oriented regional shopping mall. There is at least one practicable alternative site in the same market which was rejected by Pyramid on grounds of infeasibility, not availability to Pyramid, when it was investigating the trade area prior to selecting Sweedens Swamp. In short, filling Sweedens Swamp would result in significant avoidable loss of wildlife habitat.

I must now determine whether this loss is "unacceptable" within the meaning of section 404(c). The context in which the particular loss would occur is important to this inquiry. The filling of Sweedens Swamp would be the

largest authorized wetland loss in Massachusetts in at least 5 years. Historically, there has been a significant cumulative loss of wetlands in Massachusetts; upwards of 50% of the wetlands in the State have been lost to date. This loss is of great concern to the State. The Massachusetts wetlands regulations were recently revised to put more stringent limitations on wetlands destruction. Activities causing the loss of more than 5,000 square feet of bordering inland wetlands (the type of Sweedens Swamp) are effectively prohibited under the new regulations. Moreover, the Massachusetts Association of Conservation Commissions and a large number of its members have expressed grave concern over the cumulative impact of similar losses. (Conservation Commissions are appointed bodies responsible for applying Massachusetts' wetland regulations at the local level.) EPA may take cognizance of these facts as reflecting the importance of the remaining wetlands in the State.

Based on the excellent wildlife value of the wetland in question, its size and setting, the avoidability of the loss, and the significance of such areas in Massachusetts, I conclude that filling Sweedens Swamp to build the proposed mall would have unacceptable adverse effects within the meaning of section 404(c).

Pyramid offered to create a 36 acre artificial marsh wetland as compensation for the destruction of the red-maple swamp known as Sweedens Swamp. I do not interpret the Section 404(b)(1) guidelines as allowing mitigation as a remedy for destroying wetlands when a practicable alternative exists. Nor does the state of the science of man-made wetland creations comfortably allow me to recommend at this time that man-made creations of wetlands should obviate the need for an alternatives test, particularly for non-water-dependent projects.

The Environmental Protection Agency has, because of its expertise and responsibility, a strong concern over the

scientific uncertainties of artificially-created wetlands, and thus such artificial wetlands' use must be conservatively applied. I am, therefore, anxious that we do not set a precedent across this nation of substituting artificial wetlands for natural, functioning wetlands without consideration of the need for destroying those natural wetlands; we simply do not have the scientific ability to certify what techniques will assure the success of such man-made creations. If we established the precedent to allow these substitutions without regard to need, the Army and EPA would be called upon continuously to judge wetland creations as replacements for natural wetlands—and the state of the science is such that we cannot make such judgments with acceptable risk to precious and dwindling natural resources.

The Environmental Protection Agency does encourage mitigation efforts for unavoidable losses of wetlands where the project did not cause or contribute to significant degradation of waters of the United States, and supports continued research in wetland creation. However, as I examined Pyramid's mitigation plan, and the conditions which would be needed to ensure that the created wetlands would be successful, I became even more convinced of the risks involved for a project which is not water-dependent, and which would unnecessarily destroy natural wetlands of proven environmental value.

After considering the full record, I determine that the construction of a shopping mall in Sweedens Swamp would cause unacceptable adverse effects on wildlife and wildlife habitat, and under the authority delegated to me by the Administrator of the Environmental Protection Agency, therefore hereby prohibit the use of the site for the proposed fill.

May 13, 1986
Date

/s/Jennifer Joy Wilson
Jennifer Joy (Hanson) Wilson

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 87-6275, 87-6295

FILED
SEP 02 1988

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of September one thousand nine hundred and eighty-eight,

JOHN A. BERSANI, NEWPORT GALERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,

Appellants,

V

JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL,

Intervenor-Plaintiffs-Appellants,

HOME BUILDING ASSOCIATION OF MASSACHUSETTS,

Intervenor-Plaintiff,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, LEE THOMAS, in his official capacity as Administrator of the United States Environmental Protection Agency, RICHARD K. DAWSON, in his official capacity as Assistant Secretary for Civil Works, United States Army, and JENNIFER JOY WILSON, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency,

Appellees,

SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION, NATIONAL AUDIBON

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SOCIETY, CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., MASSACHUSETTS AUDIBON SOCIETY, CITIZENS FOR RESPONSIBLE ENVIRONMENTAL MANAGEMENT, MASSACHUSETTS SOCIETY FOR CONSERVATION PROFESSIONALS, AUDIBON SOCIETY OF RHODE ISLAND, RHODE ISLAND ASSOCIATION OF CONSERVATION COMMISSIONERS and NATURAL RESOURCES DEFENSE COUNCIL,

Intervenor-Defendants.

Petitions for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsels for the Appellants JOHN A. BERSANI, NEWPORT GALERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES, and Intervenor-Plaintiffs-Appellants JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that the vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

APPENDIX E

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a dis-

posal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

APPENDIX F

SUBPART B—COMPLIANCE WITH THE GUIDELINES

40 C.F.R. § 230.10 Restrictions on discharge.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within

the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.